United States Court of Appeals

for the Second Circuit

APPENDIX

77-7217

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES COURT OF APPEALS
FILED
JUL 8 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

MAGNALEASING, INC.,
Plaintiff-Appellee,

-against-

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,
Defendants-Appellants.

JOINT APPENDIX

Volume I, pp. 1a - 154a

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Ex. 5

MAC MAHON, J.

DATE	PROCEEDINGS	Date Of Judgment
Dec 19-74	Filed Complaint and Issued Summons.	
Jan.2-75	Filed summons & Marshal's returns. Served:	
	Blackfriars Realty Corp. By: H.R. Altus 12-26-74	
	thru Sec. of State of NYS, Albany, N.Y.	
	Tottenham Realty Corp. H.R. Altus " 12-26-74 "	
	Staten Island Mall	
Jan.20-75	Filed addt'l summons & Marshal's returns. Served:	
	Blackfriars Realty By: D.H. Siskind 1-8-75	
	Tottenham Realty " " "	
	Staten Island Mall Mr. Warner 1-13-75	
Feb.5-75	Filed Stip & Order extending to 2-14-75 for def't to move or answer the complt.....MAC MAHON, J.	
Feb.11-75	Filed ANSWER to complt by defts.	MBG/
Feb.25-75	Filed defts notice to take deposition of pltff.	
Feb.25-75	Filed defts request for production of documents.	
Mar.4-75	Filed AMENDED ANSWER to complt by defts.	MBG.
Mar.25-75	Filed Stip & Order adjourning to 3-31-75 deposition of pltff..... MAC MAHON, J	
Mar.28-75	Filed pltffs request for production of documents.	
Mar.28-75	Filed pltffs notice to take deposition of deft (Staten Island Mall).	
Mar.28-75	Filed pltffs notice to take deposition of deft (Blackfriars Realty.)	
Apr.8-75	Filed defts response to pltffs request for production of documents.	
Apr.22-75	Filed pltffs reply to counterclaim of defts.	
8-12-75	Filed Consent Order extending to 11-20-75 for discovery & deposition of pltffs & defts.....MAC MAHON, J	
10-9-75	Filed pltffs notice to take deposition of George Kirtland. Subpoena issued.	
10-10-75	Filed pltffs notice to take deposition of John Feist. Subpoena issued.	
10-21-75	Filed defts notice to take deposition of pltff. by Thomas M. Hafner.	
10-21-75	Filed defts notice to take deposition of pltff by G. A. Michaelson.	
10-21-75	Filed defts notice to take deposition of D.F. Minahan, as a witness.	
10-21-75	Filed defts notice to take deposition of H.E. Grenesko, as a witness.	
10-21-75	Filed defts notice to take deposition of W.R. Cline, as a witness.	
10-23-75	Filed defts notice to take deposition of Dale Kelly.	
10-24-75	Filed pltffs notice to take deposition of Tottenham Realty, by (Feist)	
10-24-75	Filed pltffs notice to take deposition of Tottenham Realty.	
10-24-75	Filed pltffs notice to take deposition of Tottenham Realty.	
10-28-75	Filed pltffs notice to take deposition of Marshall Bratter Greene Allison & Tucker.	
10-28-75	Filed pltffs notice to take deposition of deft Staten Island Mall.	
10-28-75	Filed pltffs notice to take depositions of A. Zitren, P. Dunne, B. Grossman, M. Labelo, & J. Turetsky. Five subpoenas iss.	
11-3-75	Filed pltffs notice to take deposition of Adam C. Heck. Subpoena issued.	
11-3-75	Filed pltffs notice to take deposition of Philip E. Lagana. Subpoena issued.	
11-5-75	Filed defts notice to take deposition of pltff by Darrel Laxon.	
11-5-75	Filed defts notice to take deposition of pltff by Daniel F. Minahan.	
11-12-75	Filed pltffs affdvt & notice of motion requiring defts to produce & permit pltffs to inspect documents. Ret. 11-14-75	
11-12-75	Filed pltffs affdvt pursuant to Rule 9(f).	
11-12-75	Filed pltffs memo of law in support of motion compelling discovery.	
11-12-75	Filed pltffs affdvt & notice of motion to hold George Kirtland in contempt for failure to obey subpoena seeved on him. Ret. 11-21-75	

Con't on Page #2

74 Civ 5593 MAGNALEASING -v- STATEN ISLAND MALL, et al 74 Civ 5593 MAC MAHON,

DATE	PROCEEDINGS
11-12-75	Filed pltffs memo of law in support of motion to enforce subpoena.
11-12-75	Filed pltffs affdvt & notice of motion to amend the pre-trial order of 5-16-75 as follows: To extend time for completion of discovery from 11-20-75 to 4-20-76. Time & date to be set by Court.
11-17-75	Filed Order that compliance with Pre-Trial Order #2 is extended to 12-5-75. Pltffs motion pursuant to FRCP Rule 16 is adjourned to 12-5-75, pltffs motion pursuant to Rule 37 is adjourned to 12-5-75, as is pltffs motion to cite George Kirtland for contempt of Court. Defts to serve papers in response to aforesaid motions upon pltff by hand no later than 5P.M. on 12-2-75.....MAC MAHON,J m/n
11-24-75	Filed defts notice to take deposition of Darrel Laxton.
12-1-75	Filed pltffs affdvt & notice of motion granting pltff leave to file an amended complt. Ret. 12-5-75
12-1-75	Filed pltffs memo of law in support of motion to amend the complt & add a party.
12-2-75	Filed memo-end on motion of 11-12-75. This matter is respectfully referred to Mag. Jacobs, as Special Master, to hear & report....So Ordered, MAC MAHON,J
12-2-75	Filed Memo-End. on motion of 12-1-75. This matter is respectfully referred to Mag. Jacobs, as Special Master, to hear & report....So Ordered, MAC MAHON,J
12-2-75	Filed Memo-End. on motion of 11-12-75. This matter is respectfully referred to Mag. Jacobs, as Special Master, to hear & report....So Ordered, MAC MAHON,J
12-2-75	Filed Memo-End. on motion of 11-12-75. Motion is granted to the extent that the time for completion of all discovery is granted to & including Feb. 20, 1976, in all other respects the motion is denied. All further discovery motions & matters related to discovery are referred to Mag. Jacobs to hear & report & to prepare a pre-trial order on or before March 1, at which time this action shall be added to the trial calendar for trial when reached in order....So Ordered MAC MAHON,J m/n
12-17-75	Filed Order that this Court's memo endorsements of 12-2-75 are modified to the extent that all four of pltffs pending motions, motion to extend completion of discovery to 4-20-76 motion to compel defts to produce addt'l documents, motion t hold (Geo. Kirtland, in contempt, & motion for leave to serv & file an amended complt & add a party deft are referred to Magistrate Jacobs, as Special Master, to hear & report. Further ordered that counsel cease corresponding with the Court.....MAC MAHON,J m/n (Copy sent to Mag. Jacobs)
12-31-75	Filed Memorandum & Order #43655. In re to report of Magistrate Jacobs filed 12-22-75, the court makes the following disposi of motion now pending in this action. Pltffs motion to exte time for completion of discovery is granted provided complet is extended to Feb. 20, 1976, at which time parties are dire to file short trial briefs & limited requests to charge (not exceed 10 pages & 10 requests. The case will be added to th court's reserve trial calendar on Mar. 1, 1976 for trial whe reached in order. Pltffs motion to compel defts to produce

DATE	PROCEEDINGS
	addt'l documents, is disposed of in accordance with the recommendati in Magistrate Jacobs report. Pltffs motion to hold George Kirtland, a non-pary witness, in contempt, is denied. Pltffs motion for leave to serve & file an amended complt is granted subject to the conditio in the Magistrate's report. Pltffs motion to add Feist & Feist as a party deft is withdrawn. Further pre-trial proceedings & discovery must proceed within the times, manner & extent already directed, unc the supervision of Magistrate Jacobs. In all other respects, all pending motions of all parties are denied.....So Ordered. MAC MAHO
12-31-75	Filed Memo-End. & Order on motion of 11-12-75 by pltff. Motion disp of in accordance with this Court's memorandum & order of this date.....MAC MAHON,J m/n
12-31-75	Filed defts memo of law in opposition to pltffs motion to amend its complt & to add a party deft.
12-31-75	Filed defts affdvt in opposition to pltffs motion to file an ameded complt & add Feist & Feist as a party deft.
12-31-75	Filed Memo-End. on pltffs motion of 11-12-75. Motion disposed of in accordance with this Court's memorandum & Order of this date. MAC MAHON,J m/n
12-31-75	Filed defts memo of law in opposition to pltffs motions to extend time for discovery & to compel addt'l document production.
12-31-75	Filed Memo-End. on motion of 11-12-75 by pltff. Motion disposed of in accordance with this Court's memorandum & Order of this dat MAC MAHON,J m/n
12-31-75	Filed Defts memo of law in opposition to pltffs motion for contempt sanctions.
12-31-75	Filed Memo-End. on motion of 11-12-75. Motion disposed of in accord with this Court's memorandum & Order of this date.....MAC MAH
1-5-76	Filed Report of Magistrate Jacobs. Extension to 2-30-76 for discover is desirable considering an amended complt should be allowed . Pltff has withdrawn its request to have Feist & Feist made a deft. Pltff should be allowed to amend its complt to embrace the addt'l charges as indicated. In view of the further discov permitted motion for contempt (Kirtland) should be denied. Fu pre-trial proceedings & discovery should go forward in the man & to the extent already directed. In all other respects the m of both parties should be denied.....MAGISTRATE JACOBS n/m/
1-13-76	Filed pltffs amended complaint.
2-5-76	Filed ANSWER by defts to the amended complt.
2-20-76	Filed pltffs reply to defts counterclaim.
2-24-76	Filed Stip & Order extending to 3-22-76 for completion of discovery, that examination of John Feist shall be the last exam of deft by pltff, etc. Both sides to submit to the Court trial memor of no more than 10 papges on 3-22-76, & shall be added to the Court's reserve trial calendar on 3-22-76 for trial when reac in order.....MAC MAHON,J
3-22-76	Non-jury trial begun.
3-23-76	Trial con't.
3-24-76	Trial con't & concluded. Total trial days (3). Decision Reserved.
4-26-76	Filed defts post-trial memorandum.
5-11-76	Filed transcript of record of proceedings, dated March 22, 23, 24, 1976.

Relevant Docket Entries.

MAC MAHON, J MACMALEASING INC VS STATEN ISLAND MALL 74 Civ 5593 LEM Page #4

DATE	PROCEEDINGS
7-2-76	Fld Memorandum #4711...The Lease is rescinded.... Accordingly, this action is referred to Mag Jacobs, as Special Master, to take an accounting and t hear, co dete mine and report as to the amt of damages due pltff. The foregoing memo constitutes this court's findings of favt and concl. of law. Settle judgme within 20 days not inconsistent with the foregoing memo...MacMahon,J. mm
7-20-76	Filed Judgment On Consent & Order that the lease agreement dtd 5- between pltff & deft, Staten Island Mall, a joint venture with (Blackfriars & ottenham) is rescinded, & that this action is referred to Magistrate Jacobs, as Special Maste to take accounting, hear, compute & determine & report the am't of damages due to pltff. Deft counterclaim is dismis without prejudice.....MAC MAHON,J. Judgment Ent. 7-20- Clerk. n/m
7-26-76	Filed Notice of Entry of Judgmentdtd 7-20-76.
9-29-76	Filed pltffs affdvt & notice of motion granting leave for Chase Ma Mortgage & Realty Trust to intervene as a deft. Ret. 10-1-
9-29-76	Filed pltffs memo of points & authorities in support.
10-4-76	Filed Stip & Order adj. to 10-8-76, motion by (Chase Man. Mortgag & Realty Trust) to intervene, etc....MAC MAHON,J.
10-6-76	Filed pltffs affdvt in opposition to motion for intervention by (Chase Manhattan Mortgage & Realty Trust)
10-6-76	Filed pltffs memo in opposition to intervention by (Chase).
10-7-76	Filed defts affdvt in opposition to motion of (Chase) to intervene
10-7-76	Filed defts memo of law in opposition to (Chase Trust's) applicatio intervene.
10-8-76	Filed movant (Chase Trust) reply affdvt to defts opposition to mot
10-8-76	Filed (Chase Trust's) reply memo in support of motion.
10-12-76	Filed pltffs surreply affdvt.
11-15-76	Filed Memo-End. on motion dtd 9-29-76. Motion denied after argu as untimely..... So Ordered, MAC MAHON,J n/m
12-1-76	Fld Pltffs' Notice of Entry of Order dated: 11-15-76
12-3-76	Fld Notice of Appeal by Chase Manhattan Mortgage & Realty Trust to USCA from order dated 12-12-76 which denies as untimely their motion to intervene as a deft.. Copies sent to Keane & Butler, 200 Park Ave. N.Y.C. 1007 Marshall, Bratter, Greene, Allison & Tucker, 430 Park Ave. N.Y.C. 10022
12-21-76	Filed pltffs post hearing brief on damages.
12 20 76	Filed Undertaking For Costs on Appeal Bond # 2484188 for the sum $ 250.00 by the National Surety Corporation
1-7-77	Filed Pltff's Post Hearing Brief on Damages.
2-7-77	Filed true copy of Stip & Order from the USCA that the appeal t by Appellant Chase Manhattan Mortgage & Realty Trust from the orde ent: 11-15-76, is dismissed without costs or attys fees etc...Pus Clerk M/N.
2-15-77	Filed Report of Magistrate Jacobs, Special Master re damages due pltff. For the reasons stated pltff is entitled to dam of (a) 96,909 for improvements; (b) $38,799.91 for exces tax rent; & (c) $21,053.08 for excess common area rent, a total of $156,769.00 with interest from 9-1-76. T f constitutes my findings of fact & conclusions of law. A objections shall be made in accordance with Rule 53( )(2 Magistrate Jacobs. n/m

Relevant Docket Entries

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [illegible] Deputy Clerk

74 Civ 5593 MAGNALEASING -v- STATEN ISLAND MALL, et al

Page #5

DATE	PROCEEDINGS
2-16-77	Filed pltffs reply to defts (Mall) post hearing memo of law on dam
2-22-77	Filed pltffs affdvt & Show Cause Order that defts show cause why order should not be made by this Court pursuant to Rule 53(adopting as its own the report of the Special Master, dtd 2- & the findings of fact & conclusions of law contained there 3-1-77.....MAC MAHON, J.
2-22-77	Filed pltffs memo in support of motion to confirm.
3-1-77	Filed defts objections to the Special Masters Report & Memo of law opposition to pltffs motion to confirm.
3-3-77	Filed Stip & Order adj. to 3-4-77 pltffs motion for an order by the Court adopting as its own report of the Special Master dtd 2-14-77, & the findings of fact & conclusions of law contai therein.....MAC MAHON, J.
3-4-77	Filed Stip & Order adj. to 3-7-77 pltffs motion that the Court ado its own report of Special Master dtd 2-14-77, etc.....MAC M
3-4-77	Filed pltffs affdvt in answer to defts objections to report of Spec Master, Magistrate Jacobs dtd 2-14-77, & the findings of fac & conclusions of law.
3-4-77	Filed pltffs response to defts objections to the Special Master's Re
3-22-77	Filed Memo Endorsedon show cause order filed 2-22-77-- See Memorand Decision of this date confirming the report of Magistrate Jacobs dat 2-14-77 and directing the parties to settle a judgment within 10 da MacMahon, J. (m/n)
3-22-77	Filed Memorandum #45714-- Pltff's. motion to confirm the report of Magistrate Jacobs, dated 2-14-77 is granted. Settle judgment within days.-- MacMahon, J. (m/n).
3-31-77	Filed Judgement # 77,449.- Ordered that the report of the Special Master, Mag. Jacobs is confirmed in its eniterity and the same is hereby adopted as the opinion of this court and it is further ordere that pltff. Magnalessing, Inc. recover from the defts, the sum of $ with interest from Sept 1, 1976 at the rate of 6% as provided by law and the costs and disbursements of this action...MacMahon, J., Judge ent: 3-31-77 . Clerk. M/N
4-4-77	Filed Pltff's Notice of Entry of Judgement dtd:3-31-77.
4-25-77	Issued 3 executions on judgt. #77,449 - in the sum of $ [illegible] against all 3 defts.
4-26-77	Filed Pltff's Notice to take deposition of defts. and request for documents in suppleme ntary proceeding.
04-28-77	Filed Defts'. Notice of Appeal to the USCA from the final judgment entered on 3-31 (copy mailed to Keane & Butler).
5-4-77	Filed ~~Pltffs'~~ appeal bond intthe sum of $250.00 bond no. 2489326 Nat Surety Crop.
5-26-77	Filed defendants' Affidavit in Opposition to plaintiff's motion to extend time, a
5-26-77	Filed Trial brief of plaintiff(received in court on 3-22-76).
5-26-77	Filed Trial Memorandum of defendants Staten Iland Mall, Blackfriars Realty and T
5-26-77	Filed Supplementary Trial Brief of plaintiff(received in court on 3-24-76)
5-26-77	Filed Supplementary Trial Memorandum of defendants(received in court on 3-25-77).
5-26-77	Filed Plaintiff's Post-Trial Brief.
5-26-77	Filed Plaintiff's Post-Trial Reply Brief.
5-26-77	Filed Damages Hearing Brief of Plaintiff.
5-26-77	Filed Defendants' Post-Hearing Memorandum of Law on Damages.
5-28-77	Filed defendants' Designation of Exhibits to the U.S.C.A.
5-26-77	Filed [illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MAGNALEASING, INC.,

Plaintiff,

-against-

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY

Defendants.

----------x

AMENDED COMPLAINT

74 Civ. 5593 (LFM)

Plaintiff, by its attorneys Keane & Butler, for its amended complaint alleges:

JURISDICTION AND PARTIES

1. The jurisdiction of this Court is based on diversity of citizenship and amount.

2. Plaintiff is a corporation organized and existing under the laws of the State of Delaware and has its principal place of business in the State of Indiana. Plaintiff is engaged in the business of leasing various properties for use by The Magnavox Company or retailers of Magnavox products.

3. Upon information and belief, defendant Staten Island Mall is a joint venture organized and existing under the laws of the State of New York with its principal place of business in the State of New York and is comprised of Blackfriars Realty Corp. and Tottenham Realty Corp.

4. Upon information and belief, Blackfriars Realty Corp. is a corporation organized and existing under the laws of the State of New York and has its principal place of business in the State of New York.

Defs Ex. CC for id

5. Upon information and belief, Tottenham Realty Corp. is a corporation organized and existing under the laws of the State of New York and has its principal place of business in the State of New York.

6. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000).

FACTS

7. On or about the 4th day of May, 1973, plaintiff and defendant Staten Island Mall entered into a lease whereby plaintiff agreed to lease from defendant Staten Island Mall space in the premises of a shopping center known as the Staten Island Mall for a period of fifteen (15) years.

8. Plaintiff agreed to pay a minimum annual rent of six dollars and fifty cents ($6.50) per square foot.

9. Plaintiff also agreed to pay Tax Rent, Common Area Charges, Utility Charges and Merchants' Association Dues (hereinafter sometimes collectively referred to as "Additional Rent").

10. Defendants, to induce plaintiff to enter into said lease, made certain representations, including among others:

a) that all of the rental space in the Staten Island Mall would be leased and that defendants were turning away tenants;

b) that at the time plaintiff was negotiating its lease the Mall was already more than 50% leased;

c) that the Tax Rent would be approximately One ($1.00) Dollar per square foot per annum when the Mall was fully operational and thereafter subject to normal tax increases;

d) that the Common Area Charges would be approximately Sixty ($.60) Cents per square foot per annum for the initial year of operation and thereafter subject to normal increases due to inflation;

e) that all tenants would share equally on a proportionate basis Additional Rent charges;

f) that plaintiff would pay no more for utilities, sewer and water charges than plaintiff would have to pay for such services if purchased through a public utility.

g) that the addition to the Mall of two department stores other than Sears and Macy's, would be announced shortly and that the third department store would be completed by the end of 1974.

11. At the time the lease was entered into, defendants knew of the existence and terms of an operating agreement by and among Sears, Roebuck and Co., R. H. Macy & Co., Inc. and Staten Island Mall (hereinafter "Operating Agreement").

12. Upon information and belief, the Operating Agreement results in plaintiff bearing a substantially higher portion of Additional Rent than its proportionate share.

13. At the time the lease was entered into, defendants knew that plaintiff was unaware of the terms of the Operating Agreement and defendants omitted disclosing the terms of the Operating Agreement to plaintiff.

14. Upon information and belief, defendants have charged plaintiff for more than plaintiff's proportionate share of Additional Rent charges.

FIRST CAUSE OF ACTION

15. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 10.

16. Defendants negotiated a lease with plaintiff during the course of which negotiations certain representations were made to plaintiff which were false and untrue.

17. The representation that all of the space in the Staten Island Mall would be leased and that defendants were being forced to turn away prospective tenants was false and in truth the premises were never more than approximately two-thirds leased.

18. The representation that at the time plaintiff was negotiating its lease the Mall was already 50% leased was false and in truth the Mall was only approximately 20% leased.

19. The representation that the Tax Rent would be approximately One ($1.00) Dollar per square foot per annum was false, and in truth the Tax Rent was more than four times as much as defendants represented when the Mall opened and is now more than six times as much as defendants represented.

20. The representation that the Common Area Charge would be approximately Sixty ($.60) Cents per square foot per annum was false, and in truth the Common Area Charge was more than four times higher than defendants had represented.

21. The representation that the addition of two more department stores would be announced and that a third department store would be open by the end of 1974 was false and in truth no

other department stores have leased space or opened for business at Staten Island Mall.

22. The representation that all tenants would share equally on a proportionate basis Additional Rent charges was untrue. Upon information and belief, defendants have entered into leases with tenants both before and after the opening of the Mall which leases provide for a different formula for paying Additional Rent charges than the formula in plaintiff's lease which results in plaintiff paying a higher proportionate share than other tenants.

23. All of the said representations were made by defendants of their own knowledge and were known to be false when made, or were made recklessly and carelessly and without any reasonable ground to believe that said representations were true and without any knowledge on the part of defendants as to whether they were true or false.

24. The said representations were made with the intent to deceive and defraud plaintiff and to induce plaintiff to enter into said lease.

25. Plaintiff, at the time said representations were made, did not know the truth regarding them, but believed that the said representations were true and relied upon them and thereby, was induced to enter into said lease.

26. Plaintiff has no adequate remedy at law.

SECOND CAUSE OF ACTION

27. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 6 and 11 through 14.

28. Defendants omitted to disclose the terms of said Operating Agreement to plaintiff in order to deceive and defraud plaintiff and to induce plaintiff to enter into said lease.

29. Plaintiff believed that the representations made by defendants were true and complete, that defendants had disclosed all material facts to plaintiff, and plaintiff thereby was induced to enter into said lease.

30. Plaintiff has no adequate remedy at law.

THIRD CAUSE OF ACTION

31. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 10.

32. Defendants made certain representations to plaintiff during the negotiations prior to plaintiff's entering into a lease at Staten Island Mall.

33. Defendants mistakenly calculated that the Tax Rent would be approximately One ($1.00) Dollar per square foot per annum.

34. In fact, the Tax Rent was more than One ($1.00) Dollar per square foot per annum.

35. Defendants mistakenly calculated that the Common Area Charge would be approximately Sixty ($.60) Cents per square foot per annum.

36. In fact, the Common Area Charge was more than Sixty ($.60) Cents per square foot per annum.

37. Plaintiff did not intend to pay nor defendants intend to receive payment of Tax Rent and Common Area Charge based upon amounts other than those represented by defendants to be the Tax Rent and the Common Area Charge.

38. Neither plaintiff nor defendants knew or believed that the Tax Rent and Common Area Charge would be in excess of the amounts represented by defendants to be the Tax Rent and the Common Area Charge.

39. Plaintiff would not have entered into said lease had it known that defendants had made a mistake in calculating the Tax Rent and the Common Area Charge.

40. Plaintiff has no adequate remedy at law.

FOURTH CAUSE OF ACTION

41. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 10 and 16 through 25.

42. As a result of said representations, plaintiff was induced to enter into said lease, to make improvements to the premises in the amount of $121,711.91 and to pay to defendant Staten Island Mall rent, Additional Rents and other payments. Plaintiff has been damaged also in a sum equal to the difference between what plaintiff agreed to pay as rent and Additional Rent and what plaintiff has paid to the date of judgment herein.

FIFTH CAUSE OF ACTION

43. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 6, 11 through 13, and 28 and 29.

44. As a result of said representations and defendants failure to disclose all material facts, plaintiff was induced to enter into said lease, to make improvements to the premises in the amount of $121,711.91, and to pay to defendant Staten Island Mall rent, Additional Rents and other payments. Plaintiff has been damaged also in a sum equal to the difference between what plaintiff agreed to pay as rent and Additional Rent and what plaintiff has paid to the date of judgment herein.

SIXTH CAUSE OF ACTION

45. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 6 and 32 through 39.

46. As a result of defendants' mistaken calculations and said representations, plaintiff was induced to enter into said lease, to make improvements to the premises in the amount of $121,711.91 and to pay to defendants Staten Island Mall rents, Additional Rents and other payments. Plaintiff has been damaged also in a sum equal to the difference between what plaintiff agreed to pay as rent and Additional Rent and what plaintiff has paid to the date of judgment herein.

WHEREFORE, plaintiff Magnaleasing, Inc. demands judgment:

1. With respect to the FIRST, SECOND and THIRD causes of action, that said lease be rescinded, declared null and void and of no effect, and plaintiff be discharged from any and all liability with regard to said lease.

2. With respect to the FOURTH, FIFTH and SIXTH causes of action, that:

(i) plaintiff be awarded the sum of $121,711.91; and

(ii) plaintiff be awarded the sum equal to the difference between what plaintiff agreed to pay as rent and Additional Rent and what plaintiff has paid to date of judgment.

3. With respect to all causes of action, that plaintiff be awarded exemplary damages of $500,000.

4. With respect to all causes of action, that plaintiff be awarded the costs and disbursements, including attorney's fees, of this action.

5. With respect to all causes of action, that plaintiff have such other and further relief as this Court deems just and proper.

Dated: New York, New York
January 7, 1976

KEANE & BUTLER

By Thomas C. Butler
A Member of the Firm
Attorneys for Plaintiff
Magnaleasing, Inc.
200 Park Avenue
New York, New York 10017
(212) 682-2247

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MAGNALEASING, INC.,

Plaintiff,

- against -

STATEN ISLAND MALL,
BLACKFRIARS REALTY CORP. and
TOTTENHAM REALTY CORP.,

Defendants.

----------x

74 Civ. 5593 LFM

ANSWER

Defendants Staten Island Mall ("Mall"), Blackfriars Realty Corp. and Tottenham Realty Corp., by their attorneys, Marshall, Bratter, Greene, Allison & Tucker, answer the amended complaint of Magnaleasing, Inc. as follows:

JURISDICTION AND PARTIES

1. Answering Paragraph 1, deny knowledge or information sufficient to form a belief as to the truth of the allegation contained therein, except admit that plaintiff invokes the jurisdiction of this Court on the basis of "diversity of citizenship and amount."

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2. Answering Paragraph 2, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

3. Answering Paragraph 3, admit the allegations thereof.

4. Answering Paragraph 4, admit the allegations thereof.

5. Answering Paragraph 5, admit the allegations thereof.

6. Answering Paragraph 6, deny the allegations thereof.

IN ANSWER TO "FACTS"

7. Answering Paragraph 7, deny the allegations thereof, except admit that on or about May 4, 1973, plaintiff and defendant Mall entered into a lease ("Lease") and respectfully refer the Court to such Lease for the terms thereof.

8. Answering Paragraph 8, deny the allegations thereof, except respectfully refer the Court to the Lease for the terms thereof.

9. Answering Paragraph 9, deny the allegations thereof, except respectfully refer the Court to the Lease for the terms thereof.

10. Answering Paragraph 10, deny the allegations thereof and further deny making the representations alleged in Paragraphs 10(a) - 10(g).

11. Answering Paragraph 11, admit the allegations thereof.

12. Answering Paragraph 12, deny the allegations thereof.

13. Answering Paragraph 13, deny the allegations thereof, except admit that defendants did not disclose the terms of the Operating Agreement to plaintiff.

14. Answering Paragraph 14, deny the allegations thereof.

IN ANSWER TO FIRST "CAUSE OF ACTION"

15. Answering Paragraph 15, repeat and reallege each allegation contained in Paragraph 1 through 10 hereof.

16. Answering Paragraph 16, deny the allegations thereof, except admit that lease negotations were had and deny further that "representations" were made to plaintiff.

17. Answering Paragraph 17, deny the allegations thereof.

18. Answering Paragraph 18, deny the allegations thereof.

19. Answering Paragraph 19, deny the alleaations thereof.

20. Answering Paragraph 20, deny the allegations thereof.

21. Answering Paragraph 21, deny the allegations thereof, except admit that no department store other than Sears, Roebuck and Co. and R.H. Macy & Co., Inc. has opened for business at Staten Island Mall.

22. Answering Paragraph 22, deny the allegations thereof, except admit that Mall has executed other leases with other tenants.

23. Answering Paragraph 23, deny the allegations thereof and deny further that any such representations were made.

24. Answering Paragraph 24, deny the allegations thereof and deny further that any such representations were made.

25. Answering Paragraph 25, deny the allegations thereof.

26. Answering Paragraph 26, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

IN ANSWER TO SECOND "CAUSE OF ACTION"

27. Answering Paragraph 27, repeat and reallege each allegation contained in Paragraph 1 through 6 and 11 through 14 hereof.

28. Answering Paragraph 28, deny the allegations thereof, except admit that defendants did not disclose the terms of the Operating Agreement to plaintiff.

29. Answering Paragraph 29, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except deny that plaintiff was induced to enter into the Lease on the basis of any such representations.

30. Answering Paragraph 30, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

IN ANSWER TO THIRD "CAUSE OF ACTION"

31. Answering Paragraph 31, repeat and reallege each allegation contained in Paragraphs 1 through 10 hereof.

32. Answering Paragraph 32, deny the allegations thereof.

33. Answering Paragraph 33, deny the allegations thereof.

34. Answering Paragraph 34, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

35. Answering Paragraph 35, deny the allegations thereof.

36. Answering Paragraph 36, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

37. Answering Paragraph 37, deny the allegations thereof and deny specifically that defendants made any such representations with respect to "Tax Rent" and/or "Common Area Charge[s]."

38. Answering Paragraph 38, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and deny specifically that defendants made any such representations concerning Tax Rent and/or Common Area Charges.

39. Answering Paragraph 39, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except deny having made a mistake in calculating or having calculated Tax Rent and/or Common Area Charges.

40. Answering Paragraph 40, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

IN ANSWER TO FOURTH "CAUSE OF ACTION"

41. Answering Paragraph 41, repeat and reallege each allegation contained in Paragraph 1 through 10 and 16 through 25 hereof.

42. Answering Paragraph 40, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except deny having made any such representations.

IN ANSWER TO FIFTH "CAUSE OF ACTION"

43. Ansering Paragraph 43, repeat and reallege each allegation contained in Paragraphs 1 through 6, 11 through 13 and 28 and 29 hereof.

44. Answering Paragraph 44, deny knowledge or information sufficient to form a belief as to the truth of the allegations

contained therein, except deny having made any such representations and having failed to disclose any material facts.

IN ANSWER TO SIXTH "CAUSE OF ACTION"

45. Answering Paragraph 45, repeat and reallege each allegation contained in Paragraphs 1 through 6 and 32 through 39 hereof.

46. Answering Paragraph 46, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except deny having arrived at any "mistaken calculations" and deny further having made any such representations.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

47. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

48. Having ratified and affirmed the Lease, plaintiff is not entitled to rescission thereof.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

49. Having failed to seek rescission and/or damages within a reasonable time after discovering the facts constituting the alleged "fraud or mistake," plaintiff has waived its right to damages and rescission.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

50. Having failed to seek rescission and/or damages within a reasonable time after discovering the facts constituting the alleged "fraud or mistake," plaintiff is estopped to assert a right to damages and rescission herein.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

51. Plaintiff's claims are barred by reason of laches.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

52. Plaintiff is estopped to assert claims concerning "Tax Rent" and "Common Area Charges" (as these terms are defined in the Lease) by reason of its failure to comply with the provisions in the Lease concerning the resolution of disputes regarding "Tax Rent" and/or "Common Area Charges", viz. Section 4.5A and 5.3B.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

53. Plaintiff's claims are barred by reason of its failure to plead allegations concerning the circumstances constituting fraud and mistake with the requisite particularity prescribed by Rule 9(b) of the Federal Rules of Civil Procedure.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

54. Some or all of plaintiff's claims are barred by reason of the applicable statute of limitations.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

55. To the extent that the complaint seeks exemplary damages, such damages are not properly cognizable herein.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

56. Plaintiff lacks standing to maintain the instant action.

AS AND FOR DEFENDANTS' COUNTERCLAIM

57. On or about May 4, 1973, plaintiff Magnaleasing, Inc. ("Magnaleasing") and defendant Mall entered into the Lease for the rental of certain premises described therein.

58. Pursuant to the terms of the Lease, Magnaleasing was required, inter alia, to pay Mall rent ("Rent") and additional rent ("Additional Rent") as defined fully in the Lease.

59. On January 5, 1975, during the term of the Lease, Magnaleasing was in default of its obligation to pay Rent and Additional Rent to Mall.

60. On January 5, 1975, by notice of petition and petition, dated December 31, 1974, Mall commenced a summary proceeding ("Summary Proceeding") against Magnaleasing entitled Staten Island Mall, a joint venture v. Magnaleasing, Inc. (Civil Court of the City of New York, County of Richmond - Index No. 0003/75).

61. The Summary Proceeding was commenced by Mall to recover $25,700.52 in Rent and Additional Rent owed by Magnaleasing through December 31, 1974 and to recover possession of the premises previously leased to Magnaleasing.

62. On February 25, 1975, Mall and Magnaleasing executed a stipulation ("Stipulation of Settlement") settling the Summary Proceeding, pursuant to which settlement Magnaleasing covenanted to pay Mall $28,911.73 -- representing all the Rent and a portion of the Additional Rent owed through February 28, 1975 -- within seven days from the date thereof.

63. No part of the $28,911.73 that Magnaleasing committed to pay Mall represents attorneys' fees and disbursements incurred by Mall in the prosecution of the Summary Proceeding against Magnaleasing. Neither does any part of such sum repre-

sent attorneys' fees and disbursements incurred by Mall in the litigation of the instant action. The Stipulation of Settlement explicitly reserved to Mall the right to litigate herein for all such attorneys' fees and disbursements as are owed it by Magnaleasing.

64. The Lease provides, inter alia, that Magnaleasing shall pay upon demand Mall's expenses (including reasonable attorneys' fees and disbursements) incurred in enforcing any obligation of Magnaleasing under the Lease and that such moneys shall constitute Additional Rent owed Mall by Magnaleasing.

65. By virtue of having to commence and prosecute the Summary Proceeding, by virtue of having to defend this action and to resist Magnaleasing's attempt to rescind the Lease and to recover, inter alia, all moneys paid pursuant thereto, and by virtue of having to litigate herein to recover from Magnaleasing the attorneys' fees and disbursements incurred in the prosecution of the Summary Proceeding, defendants have incurred and will incur reasonable attorneys' fees and disbursements in the course of enforcing Magnaleasing's obligations under the Lease.

66. As of March 3, 1975, Mall had incurred reasonable attorneys' fees in excess of $19,418.50 and disbursements in excess of $535.40 in connection with the prosecution of the Summary Proceeding and the maintenance of the instant action.

67. Notwithstanding the appropriate provisions of the Lease, Magnaleasing has refused to pay Mall the $19,418.50 for legal services rendered and the $535.40 for disbursements incurred, or any portion thereof, despite due demand therefor.

68. By reason of the foregoing, defendants have been damaged in an amount exceeding $19,953.90 and are and will be damaged in an amount representing such additional reasonable attorneys' fees and disbursements as have been and will be incurred in the course of enforcing Magnaleasing's obligations under the Lease.

WHEREFORE, defendants demand judgment

1. Dismissing the complaint;

2. Declaring that the Lease is valid and in full force and effect and that Magnaleasing remains liable thereunder;

Defendants' Answer to Amended Complaint

3. With respect to their Counterclaim, that defendants be awarded the sum of $19,908.80, plus such additional reasonable attorneys' fees and disbursements as have been and will be incurred herein, together with interest thereon in accordance with law;

4. That defendants be awarded the costs and disbursements of this action, and

5. That defendants have such other and further relief as this Court may deem just and proper.

Dated: New York, New York
February 4, 1976

Yours, etc.,

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By _____
A Member of the Firm
Attorneys for Defendants
430 Park Avenue
New York, New York 10022
(212) 421-7200

Plaintiff's Reply to Defendants' Counterclaim

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MAGNALEASING, INC., Plaintiff, 74 Civ. 5593 (LFM)

-against- REPLY

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,

Defendants.

----------x

Plaintiff, Magnaleasing, Inc. ("Magnaleasing") by its attorneys, Keane & Butler, for a reply to the counterclaim of the defendants set forth in paragraphs 57 to 68 inclusive, of the answer to the amended complaint filed herein:

1. Denies each and every allegation set forth in paragraphs 59, 65, 66, 67 and 68.

2. Replying to paragraph 57 of said answer, denies the allegation thereof, except admits that on or about May 4, 1973, plaintiff Magnaleasing and defendant Staten Island Mall ("Mall") entered into a lease and respectfully refers the Court to said lease for the terms thereof.

3. Replying to paragraphs 58 and 64 of said answer, denies each and every allegation thereof and respectfully refe the court to said lease for the terms thereof.

4. Replying to paragraph 61 of said answer, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except admits that Mall commenced a Summary Proceeding against Magnaleasing.

Plaintiff's Reply to Defendants' Counterclaim

5. Replying to paragraph 62, denies each and every allegation thereof, except admits that on February 25, 1975, Mall and Magnaleasing executed a Stipulation settling the Summary Proceeding, pursuant to which settlement Magnaleasing paid $28,911.73, and respectfully refers the Court to the Stipulation for the terms thereof.

6. Replying to paragraphs 63 of said answer, plaintiff lacks knowledge or information sufficient to form a belief as to the truth of the allegations thereof, except admits that the Stipulation of Settlement reserved certain rights, and respectfully refers the Court to the Stipulation for the terms thereof.

WHEREFORE, plaintiff demands that defendants' counterclaim be dismissed and that it be awarded judgment as prayed in the amended complaint.

Dated: New York, New York
February 17, 1976

KEANE & BUTLER

By Thomas A. Butler
A Member of the Firm
Attorneys for Plaintiff
Magnaleasing, Inc.
200 Park Avenue
New York, New York 10017
(212) 682-2247

Opinion #44711, Filed July 6, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Copy
U.S. DISTRICT COURT
FILED
JUL 06 1976
S.D. OF N.Y.

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MAGNALEASING, INC.,

Plaintiff,

-against-

STATEN ISLAND MALL,
BLACKFRIARS REALTY CORP. and
TOTTENHAM REALTY CORP.,

Defendants.

----------x

74 Civ. 5593-LFM

MEMORANDUM

44711

MacMAHON, District Judge.

This action seeks damages and rescission of a lease agreement between plaintiff and defendant Staten Island Mall ("Mall"). Plaintiff alleges that it was induced to sign the lease by the fraudulent misrepresentations of defendants' agent, Feist & Feist. The case was tried to the court on March 22, 23 and 24, 1976.

Magnaleasing, a wholly-owned subsidiary of the Magnavox Company, is engaged in leasing real estate for its parent and its parent's independent retailers. Defendant Mall is a joint venture between defendants Blackfriars Realty Corp. and Tottenham Realty Corp. Feist &

Feist was the developer of the Mall and now acts as its managing and leasing agent.

Magnaleasing negotiated with Feist & Feist during the fall of 1972 for the leasing of a store in the Mall and eventually signed a fifteen-year lease on April 26, 1973. Plaintiff claims that during the negotiations and to induce plaintiff to enter into the lease, Feist & Feist made material misrepresentations regarding the amount of space already leased to others and false estimates as to what the common area charges and tax rent would be. Defendants assert that the representations were true, and that, regardless of their veracity, plaintiff was not justified in relying on them. Defendants further contend that, even if plaintiff establishes fraud, relief is barred by laches.

Negotiations over space in the Mall were conducted by George Kirtland of Feist & Feist and John Kelly of Magnaleasing. John Kelly received two Mall brochures from Kirtland in November 1972 which represented that 50% of the space had already been leased.[1] Kirtland met with John Kelly; Dale Kelly, a Magnavox zone manager; and Darryl Laxon, a Magnavox regional

sales manager, on December 4, 1972. Both John and Dale Kelly testified that Kirtland said the Mall was practically all leased, with only one or two spaces left of the size needed for a Magnavox store. Dale Kelly testified that Kirtland told him the Mall was 90% leased. Two floor plans representing the first and second levels of the Mall were then discussed. Leased locations were designated by a black dot or the names of future tenants. Over 60% of the available space was so designated. Kirtland also explained that more stores had signed leases since the plans had been printed. Those names were supplied by Kirtland, and John Kelly wrote them in the appropriate spaces.

There is no doubt that the representations regarding occupancy levels were representations of material facts made to induce plaintiff to rent space. The number of other stores in the Mall is important because it affects the amount of customer traffic and the amount of common costs each tenant will have to bear. Moreover, the volume and pace of demand for space evidence the general enthusiasm of other merchants, and the level of acceptance bears on the Mall's eventual success. The representations were made in the context of a sales pitch

by the leasing agents. It is clear that Feist & Feist knew that the rate of leasing was an important factor in a tenant's decision of whether or not to rent space in the Mall, and Feist & Feist made those representations hoping Magnavox would rely on them. Dale Kelly testified that without those representations he would not have recommended that the lease be signed.

Feist & Feist's statements as to occupancy levels were false at the time they were made. A leasing report, prepared by Feist & Feist, dated September 14, 1972, shows that only 19% of the space was leased, but an August brochure states that 50% of the space was already rented.

Plaintiff also introduced a schedule listing all the leases signed by the Mall, the date on which they were signed, and computing the percentage of rented space every month. When Feist & Feist was representing, at the beginning of November, that the Mall was over 50% leased, the fact was that it was less than 32%. When Kirtland told the representatives of Magnavox, on December 4, that the Mall was almost all rented and that commitments from tenants exceeded the 60% shown on a floor plan of the shopping area, the Mall was still only 32% leased.

Finally, Feist & Feist, as defendants' agent responsible for leasing and managing the shopping area, was aware of the actual rate at which the Mall was being leased. John Feist, vice-president of the company and in charge of the Mall's development, testified that every three weeks a leasing committee met and that a leasing report was prepared and circulated.

Defendants assert that their figures were accurate because they included leases which had been agreed upon but had not yet been signed. The September 1972 leasing report indicated that an additional 44.68% of the available space in the Mall was thus "tied up." Defendants contend that consummation of these agreements was a mere formality and, therefore, their representation that the Mall was 50% leased was not false.

The contention that eventual signature on these agreements was merely ceremonial is belied by the fact that it was not until over one year later that leases totalling the additional 44.68% were actually signed, and, in any event, the statements made were inaccurate whatever the state of negotiations.

Defendants next argue that, even if some of the representations were false, plaintiff was not justified in relying on them because only 24.2% of the space on the floor plan of the shopping center is marked by black dots designating space already leased. The contention ignores the testimony of both Kellys that Kirtland told them that spaces fitted with the printed name of a merchant (but perhaps without a black dot) were also rented, and that in order to make the plan current John Kelly should write in the names of tenants who had signed since the plan was prepared. In light of this uncontradicted testimony, defendants' claim is totally without merit.

We find that defendants, through their agent, knowingly made material false representations regarding the volume and rate of leasing in order to induce plaintiff to rent space in the Mall.

Plaintiff also alleges that Feist & Feist made false statements regarding its estimates of the additional rent which tenants would be charged. Each tenant was to pay taxes and common area charges in addition to the fixed rent.

At the December 4 meeting, Kirtland said that the taxes were estimated at $1.25 per sq. ft., with the landlord paying the first $.25, and that thereafter taxes would be subject to normal increases. The common area charges, according to Kirtland, were estimated at $.60 per sq. ft. for the initial year and thereafter would be subject to normal increases due to inflation.

Plaintiff asserts that defendants' real estimates were far greater than the figures given.[2] Defendants assert that the figures given by Kirtland to the Magnavox employees were true estimates and contend that, in any case, mere expressions of estimates are opinions which cannot form the basis of an action for fraud.

It has long been the law of New York that an expression of opinion may constitute actionable fraud.[3] A statement of a man's opinion, estimate or prediction is a representation of his state of mind and, like his intent, is "as much a fact as the state of his digestion."[4] Mere predictions, however, may not form the basis for an action for fraud when both parties have equal access to the facts, or when it is obvious that the declarant is using a subjective standard. In these

situations, reliance on the opinions is deemed unreasonable. However, where one party does have superior knowledge, the expression of an opinion implies that the declarant knows facts which support that opinion and that he knows nothing which contradicts the statement.

Only defendants were in a position to know the estimated costs of the completed Mall, the information necessary to form an opinion regarding the taxes and common area charges. Since the Mall was not completed at the time of the negotiations, Magnaleasing had to rely on what it was told by the developers of the shopping area. It was therefore reasonable for plaintiff to rely on defendants' representations, and if defendants gave plaintiff an estimate which defendants, in fact, did not entertain, in order to induce plaintiff to sign a lease, their estimates were fraudulent. The expression of an opinion or prediction which the declarant does not himself believe is a false statement of fact.

Although plaintiff was told in December 1972 that taxes were going to be $1.25 per sq. ft., those persons at Feist & Feist in charge of the financial data regarding the construction and operating expenses of the

Mall were circulating estimates well in excess of that amount.

In August 1972, Don Faughnan, the comptroller of Feist & Feist, issued two memoranda estimating the tax at $2.15 per sq. ft. Faughnan testified that he also discussed that figure with John Feist. Ed Fraher, in charge of the financial data relating to construction, estimated the tax at $2.53 per sq. ft. John Feist sent Irving Feist, president of the company, a confidential memorandum in December 1972 admitting that Ed Fraher had told him that the taxes would be $2.34 per sq. ft. and warning that they would have problems with their tenants if taxes were that much. A Feist & Feist memorandum in January indicated that the initial taxes would be $2.42 and that they would be $4.55 per sq. ft. for the second year.

Surrounded by these estimates of over $2.00, John Feist, nevertheless, instructed his salesmen to tell potential tenants that the Feist & Feist estimate was $1.25. He testified that he did not believe his financial experts and relied instead on his own estimate which he based on a 1970 tax of $.80 per sq. ft. imposed on a

nearby Korvette's shopping center. Feist testified that he adhered to this estimate, although the Korvette's center was not a covered mall, as was defendant Mall, and although the Korvette's parcel, completely developed, was assessed at $6.8 million, while the land alone for defendant Mall was valued at nearly $6 million.

We find John Feist's story, that he relied on the tax of a dissimilar shopping area while rejecting the opinions of the Feist & Feist financial experts, totally incredible. Moreover, John Feist was evasive and unresponsive on the witness stand. He denied any memory of receiving memoranda addressed to him, even those bearing his own notations.

Clearly, the tax charged to a tenant per square foot is a material fact. We find that Feist & Feist, defendants' renting agent, deliberately misrepresented its tax estimate in order to induce plaintiff to lease space in the Mall.

The record regarding common area charges is similar. Although Kirtland represented on December 4 that Feist & Feist estimated common area charges at $.60 per sq. ft., in August 1972 Faughnan had sent two memoranda

to John and Irving Feist. The first estimated such charges at $1.76, and the second at $2.26 per sq. ft. Fraher estimated the charges at $2.26 in October, and a January memorandum of Feist & Feist estimated them at $2.04.

Again, surrounded by estimates of over $2.00, John Feist substituted the more saleable figure of $.60. His only explanation for the disparity between his estimate of the charges and the resulting actual charge of $2.59 per sq. ft. to tenants was the unpredictable effect of the Arab oil embargo on snow removal. This is even less convincing than his explanation for misrepresenting estimated taxes.

We find that Feist & Feist deliberately misrepresented $.60 as its estimate of the per square foot common area charge when, in fact, it actually believed that the charge would be substantially greater.

We turn now to the defense of laches. Defendants contend that, even if plaintiff has been able to establish fraud, its delay in bringing this action while remaining in possession of the property should bar recovery.

An action for fraud does not accrue until discovery of the fraud. Plaintiff first learned that the additional rent charges for taxes would exceed the Feist & Feist estimate in August 1973 when taxes were billed at $2.45 per sq. ft. Plaintiff was never told of the Feist & Feist estimate of $4.55 for the second year taxes. Instead, plaintiff was told, in April 1974, that the second year tax estimate was $2.64. Plaintiff was backbilled in 1975 at the rate of $5.80.

Plaintiff first learned about the misrepresentations regarding common area charges in April 1974. At that time, it was backbilled to February 1, 1974, at a rate of $2.58 per sq. ft. Only in December 1974 were common area charges backbilled for the period between August 9, 1973 through January 31, 1974, at the rate of $2.58 per sq. ft.

Plaintiff promptly protested each time it learned of the difference between what was represented and what it was actually charged for taxes and common area charges. Letters were exchanged in the fall of 1973 over the amount of tax rent that was being charged. John Kelly wrote John Feist, in April 1974, setting forth

the misrepresentations regarding tax rent, common area charges and occupancy levels. A meeting and further correspondence occurred in May and June 1974. That summer, plaintiff, along with other tenants, hired an attorney to negotiate with the landlord. Plaintiff stopped paying additional rent charges over the represented estimates in August 1974. Defendants then sued in the fall of 1974 for rent arrears. This action was filed December 19, 1974.

The facts cannot support any claim by defendants that there was undue delay in bringing this action. After every discrepancy became known, defendants were made aware of plaintiff's objections and attempts were made to settle the dispute by negotiations.

This action was filed in December 1974, although the extent of defendants' misrepresentations were still not completely known. There is no evidence of undue delay. We, therefore, do not consider whether defendants have been prejudiced. Finally, plaintiff was not required to leave the premises before bringing this action.[5] Recovery is not, therefore, barred by waiver or laches.

BEST COPY AVAILABLE

Opinion #44711, Filed July 6, 1976

Accordingly, we find that plaintiff was induced to enter into the lease for space in the Mall by material false and fraudulent representations by defendants' agent. The lease is, therefore, rescinded.

It appears that the issue of the amount of damages due to plaintiff is complex and will involve matters of accounting. Accordingly, this action is referred to Magistrate Martin D. Jacobs, as Special Master, to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff.

The foregoing memorandum constitutes this court's findings of fact and conclusions of law, in accordance with Rule 52, Fed.R.Civ.P.

Settle judgment within twenty (20) days not inconsistent with the foregoing memorandum.

Dated: New York, N. Y.
June 30, 1976

Lloyd F. MacMahon

LLOYD F. MacMAHON
United States District Judge

Opinion #44711, Filed July 6, 1976

Magnaleasing, Inc. v. Staten Island Mall et al. 74 Civ. 5593-LFM

FOOTNOTES

1

"More than 50 per cent of the space at Staten Island Mall has been leased by local and national chains." Staten Island Mall, August 1972.

"Feist & Feist, developers of the Mall with associated investors, said that leasing has surpassed the 50 per cent mark." Staten Island Mall, November 1972.

2

Presently, plaintiff is charged $6.04 per sq. ft. for taxes and $2.59 per sq. ft. for common area charges.

3

Taylor v. Burr Printing Co., 26 F.2d 331, 334 (2d Cir. 1928); Gray v. Richmond Bicycle Co., 167 N.Y. 348, 60 N.E. 663 (1901); Hickey v. Morrell, 102 N.Y. 454, 7 N.E. 321 (1886); W. Prosser, Law of Torts § 109 (3d ed. 1964); 12 S. Williston, Contracts § 1494 (3d ed. 1970); 24 N.Y. Jurisprudence §§ 35-39.

4

NLRB v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, 729 (2d Cir. 1965); Edgington v. Fitzmaurice [1885], 29 Ch.D 459, 483.

5

N.Y. Civil Practice Law & Rules § 3004 (McKinney 1974).

Judgment, Filed July 20, 1976

MacMahon

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MAGNALEASING, INC.,

Plaintiff,

- against -

STATEN ISLAND MALL,
BLACKFRIARS REALTY CORP. and
TOTTENHAM REALTY CORP.,

Defendants.

----------x

74 Civ. 5593 (LFM)

JUDGMENT ON CONSENT

U.S. DISTRICT COURT
FILED
JUL 20 1976
S.D. OF N.Y.

This cause having come on for trial on March 22, 23 and 24, 1976, before Honorable Lloyd F. MacMahon, District Judge, and the Court having considered this cause upon the pleadings and evidence presented on trial and upon briefs by counsel for the parties and upon the findings of fact and conclusions of law set forth in the opinion filed in this Court on July 6, 1976, it is hereby

ORDERED, ADJUDGED AND DECREED that the lease agreement dated May 4, 1973 between plaintiff Magnaleasing, Inc. and defendant Staten Island Mall, a joint venture comprising Blackfriars Realty Corp. and Tottenham Realty Corp., be and the same hereby is rescinded; and it is further

Judgment, Filed July 20, 1976

ORDERED, ADJUDGED AND DECREED that this action be and the same hereby is referred to Magistrate Martin D. Jacobs, as Special Master, to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff, and it is further

ORDERED, ADJUDGED AND DECREED that defendants' counterclaim be and the same hereby is dismissed without prejudice.

Dated: New York, New York
July 14, 1976

Lloyd F. MacMahon
U.S.D.J.

JUDGMENT ENTERED

CLERK

Report of Magistrate Jacobs, Filed February 14, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MAGNALEASING, INC.,

Plaintiff,

- against -

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,

Defendants.

----------X

REPORT OF MAGISTRATE JACOBS, SPECIAL MASTER

74 Civ. 5593 (LFM)

In his decision dated June 30, 1976 Judge MacMahon granted plaintiff recision of its lease with the Mall finding that defendants had made material representations with respect to the rate of leasing, the amount of tax rent, and the amount of common area rent. With respect to leasing, the Court found that defendants falsely represented that as of November 1975 "50 percent of the space has already been leased" and as of December 4, 1972 "the Mall was 90 percent leased" and "was almost all rented". With respect to tax rent, it found that defendants falsely represented that taxes were estimated at $1.25 per square foot, the landlord paying the first 25 cents, and that thereafter taxes would be "subject to normal increases". With respect to common area rent, it found that defendants falsely represented that such charges were estimated at 60 cents

Report of Magistrate Jacobs, Filed February 14, 1977

per square foot for the initial year and thereafter would be "subject to normal increases due to inflation". As to damages the Court stated: "It appears that the issue of the amount of damages due to plaintiff is complex and will involve matters of accounting. Accordingly, this action is referred to Magistrate Martin D. Jacobs, as Special Master, to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff."

A trial was held before me on damages on August 31 and November 4, 1976. At pre-trial conferences I had directed certain discovery. At the trial there testified for plaintiff Henry E. Grenesko (leasehold specialist of plaintiff); Samuel J. Rogell (vice president and general counsel of plaintiff); William J. Cline (representative of plaintiff in charge of construction improvements); Phyllis Blank (accounting analyst of plaintiff); Clarence Farrar (officer of Bond Stores); and John F. Kelly (officer of plaintiff).

Plaintiff claims damages of (a) $96,909 for the constructing and fixturing cost of the store; (b) $38,742 for tax rents paid in excess of those represented; and (c) $21,686.81 for common area rent in excess of those represented; all such amounts including interest to August 31, 1976.

Report of Magistrate Jacobs, Filed February 14, 1977

Defendants' contentions are: Plaintiff has no right to damages since the payments were made by its parent Magnavox Company, not plaintiff. As to improvements, there was a failure to mitigate damages. As to tax and common area rents, plaintiff is seeking "loss of profit", and not pecuniary loss,to which it is not entitled. As to tax and common area rents, any recovery must be limited since plaintiff was negligent in negotiating for such rents on the basis of leased, rather than leasable, space. As to common area rents, the inflation or increase factor used by plaintiff is insufficient.

I.
(Objections to Reference)

Defendants contend that the reference to determine damages was improper since plaintiff had every opportunity to offer proof of damages at the main trial but failed to do so.

In my view whether the reference was proper is not before me. However, the following should be noted. The Court's decision was filed on July 6, 1976 and at a pre-trial hearing on July 14 before me defendants made no objection tothe reference but requested additional discovery which was granted. It was not until the damage trial, which commenced on August 31, 1976, that defendants objected to the reference. Moreover, in my view plaintiff has demonstrated that the objections are without merit

urging as follows: Defendants failed to make any timely objection to the Court consenting to the judgment directing the reference. Even if there were no evidence of damages at the trial it was within the sound discretion of the Court to reopen the record. In fact there was sufficient evidence at the trial for a computation of damages there being evidence as to the improvements and the tax and common area payments (See plaintiff's reply memo on damages p. 5).

II.
(Right of Plaintiff to Claim Damages)

Plaintiff, a subsidiary of Magnavox, was a leasing corporation which leased stores and sublet them. It ceased making leases in February 1974 but it made eight such sub-leases prior to February 1974 and all such leases are now outstanding except that involving the Mall (T. 38, 85, 169). Plaintiff, while a division of Magnavox in a business sense, has at all times formally maintained a separate identity. It has kept separate records; has had regular meetings of its board of directors (T. 131, Ex. D); and has kept separate financial statements and a general ledger (Ex. C, Ex. 10). It is true that plaintiff has had no separate cash or bank account (T. 87). All payments to defendants were made by check of Magnavox at the request of plaintiff (T. 21, 32, 123). Any payments received

by plaintiff were endorsed over to Magnavox. On the books of plaintiff, the payments directly made by Magnavox were treated as an advance to or debt from plaintiff and any payments received by plaintiff from other sources were credited to plaintiff so as to reduce its indebtedness. Prior to July 1976 plaintiff's account with Magnavox showed a debt from plaintiff of $464,215 but as a result of a tax credit in July, resulting from a consolidated tax return, there was a credit to plaintiff of $23,000 (T. 126, 128).

Even though payments on behalf of plaintiff were made directly by Magnavox, it is clear that plaintiff operated as a corporate and financial entity. The mere fact that Magnavox directly made payments is not significant under the particular facts. Plaintiff incurred a liability to Magnavox for the cost of the improvements and the tax and common area charges and in fact repaid Magnavox for these expenditures. The authorities clearly establish that a party is entitled to damages where it is liable for the items sought to be recovered. See Silensky v. State-Wide Insurance Company, 30 A.D. 2d 1, 289 N.Y.S. 2d 541 (2nd Dept. 1968); Kinsfather v. Grueneberg, 47 A.D. 2d 789, 365 N.Y.S. 2d 903 (3rd Dept. 1975); J. Harry McNally, Inc. v. State, 170 Misc. 914, 11 N.Y.S. 2d 577 (Ct. of Claims 1936). In Silensky the Court said that the party is entitled to damages

so long as it "has in some way paid for his benefits, or is absolutely or conditionally liable to repay his benefactor". In Kinsfather plaintiff sought to recover monies for care paid for by a social service agency. Plaintiff had not in fact paid the bills nor had the agency placed a lien against her. The Appellate Division held that since there was a liability to repay plaintiff could recover the nursing home costs whether or not the agency sought to enforce the liability. In McNally damages were awarded to contractors for what they would be liable to sub-contractors, even though the sub-contractors had not actually been paid, the Court holding that the determining factor was whether liability existed. In the present case plaintiff not only was liable for the amounts paid but in fact has repaid its liability to Magnavox.

My conclusion is reinforced by a stipulation received in evidence at the main trial (Ex. 7) that "Magnaleasing has paid and continued to pay rent and additional rent due under the lease" (T. 58, 59).

Defendants in effect seek to pierce the veil of the corporate entity in order to bar any recovery by plaintiff. The doctrine is usually invoked where the party whose separate corporate existence is challenged has been involved in a fraud

or other wrongdoing. The doctrine cannot be invoked by a party in order to retain monies improperly obtained. In Boise Cascade v. Wheeler, 419 F.Supp. 98, 102 (S.D.N.Y. 1976) Judge MacMahon stated

> "- - - it is axiomatic that a corporation is a creature of the law, endowed with a personality separate and distinct from that of its owners and the dual personality of parent and subsidiary is not lightly disregarded."

III.
(Claim that Plaintiff is Improperly Seeking to Recover "Loss of Profit")

Defendants contend that to award plaintiff damages for "the increment and common area charges and tax rent paid above those represented to it in advance would be effectively to award it the benefit of the bargain, a forbidden measure of damages for fraud under the NewYork law" (Def's memo p. 2). While this contention may be ingenious it is in my view totally lacking in merit and the authorities cited by defendants do not apply to the facts here present.

It is well recognized that the measure of damages in an action for fraud is the pecuniary loss suffered by the defrauded party as a direct result of the false representations (Martine Theatre Corporation v. Schine Chain Theatres, Inc., 278 F.2d 798 (2d Cir. 1960); Reno v. Bull, 226 N.Y. 546 (1919)).

In effect plaintiff here seeks to recover only what it actually paid for taxes and common area charges as the result of the fraudulent representations. The difference between the rent actually paid and the rent as represented constitutes an overpayment, in keeping with the measure of damages for fraud. None of the cases cited by defendants deny recovery to a defrauded party for money actually expended by it.

IV.
(Claim for Improvements)

The improvements involved items such as general construction, completing dividing walls, the front, the facade, suspended ceilings, heating and air conditioning, ventilating, plumbing, and sprinkler system (T. 105). There was credible testimony that the original cost of such construction was $107,073.39, based upon contracts awarded after competitive bids (Ex. 1, T. 106). Deducting the allowance by defendants of $7,252 (T. 33), and depreciation taken to June 30, 1976 of $16,637, leaves $83,184. Adding interest at six percent to August 31, 1976 would result in $96,909. Depreciation was taken on the basis of 15 years, consistent with the treatment on the

books of plaintiff (T. 51, 83, 117). Mr. Cline testified that the present value to plaintiff of the improvements was "none"; that the improvements and fixtures were "adapted to the particular store"; and that the improvements have been abandoned by plaintiff (T. 106, 107). The lease to plaintiff and the sub-lease by it are no longer in effect and the store is now vacant. While defendants claim that there was a failure by plaintiff to mitigate damages a party is only required to make reasonable effort to minimize damages and defendants have failed to prove that plaintiff failed to act reasonably or what amount of damage, if any, could have been avoided. I find that the improvements were particularly adapted for use in the store and would have no salvage value if removed.

Accordingly, I find that plaintiff's claim is reasonable and proper and that it is entitled to damages on this claim of $96,909.

V.
(Tax Rents)

As found inthe Court's decision, there was a false representation that the tax rents were $1.00 with "normal increases".

Report of Magistrate Jacobs, Filed
February 14, 1977

Plaintiff claims for the first year of the lease a difference between the represented tax rent and the tax rent actually paid. The assessment on the property has not changed but the actual increase in taxes for later years (commencing July 1, 1974) was 6.8 percent and 11.36 percent. The resulting claim is $36,578.14 (revised Exhibits 8 and 8-a) and interest of $2,163.86 to August 31, 1976, totaling $38,742. Defendants concede that the "inflation factor" is the actual percentage increase (Def's memo p. 16).

Defendants make the unusual contention that the claim must be reduced because of plaintiff's inept negotiation of tax rentals based on leased, not leasable, space (Defs' memo p. 12). If defendants' contentions were upheld the claim for tax rents would be reduced from $36,578.14 to $24,897.35. Even if it were significant that tax escalation clauses are usually based on leasable space plaintiff has demonstrated that of 114 leases at the Mall only 13 were entered into on a leasable basis. It would appear that the clause in plaintiff's lease was a usual, and certainly not an unusual, clause. Moreover, it comes with ill grace for defendants to raise this contention in view of the Court's finding that there was a fraudulent representation as to

the occupancy level. There would have been no differences between "leased" and "leasable" had the actual occupancy level been as represented. Furthermore, plaintiff points out that at the trial defendants conceded that the representations were not conditioned upon the charges being computed on a leasable basis (Trial Transcript 300).

Accordingly I find that plaintiff's claim is reasonable and proper and that it is entitled to damages of $38,799.91 with interest from September 1, 1976.

VI.
(Common Area Rent)

This was intended to cover such charges as cleaning, electricity, snow removal and expenses necessary to operate the Mall (T. 65).

Plaintiff's claim is based on an inflation factor of 10 percent (derived from the Consumer Price Index for the New York area) and would be $20,166.76 and interest or $21,686.81 (Revised Exhibit 7, 7-a).

If the rent charges were based on leased, not leasable space, damage would be less but we have already rejected this contention in our discussion of tax rents (V above).

Report of Magistrage Jacobs, Filed February 14, 1977

I was of the view that plaintiff's reliance on the Consumer Price Index was remote and I suggested that the parties furnish me with available statistical data as to common area charges for shopping centers. There was presented to me two publications ("The Dollars and Cents of Shopping Centers 1975" and "The Dollars And Cents of Shopping Centers 1972"). Plaintiff's revised Exs. 7 and 7-a from these publications shows 15.5 percent inflation rate. Defendants claim that based on these publications the proper inflation rate would be 48.7 percent per year, defendants taking middle range figures in the 1975 study limited to figures involving shopping centers one to three years old (Ex. F). Defendants' presentation would result in damage of $16,263.66 plus interest compared with a claim of $21,053.08 including interest if based on an increase of 15.5 percent. Plaintiff fairly criticizes defendants' approach to the inflation rate since it takes the middle range, rather than the median, and limits it to the centers approximating the size of the Mall.

Without analyzing all the complicated computations that might be made, the most significant evidence is that the charges to plaintiff for common area rent have not increased since it entered the Mall in August 1973 and defendants have not introduced any evidence of increases in common area expenses since the shopping center was opened.

Report of Magistrage Jacobs, Filed
February 14, 1977

In any event I find that under all the circumstances an inflation factor of 15.5 percent would be fair and reasonable.

Accordingly, I find that plaintiff is entitled to damages of $21,053.08.

VII.
(Total Amount of Damages)

Plaintiff is entitled to damages of (a) $96,909 for improvements; (b) $38,799.91 for excess tax rent; and (c) $21,053.08 for excess common area rent, making a total of $156,769.99 with interest from September 1, 1976.

The foregoing constitutes my findings of fact and conclusions of law.

This report has been filed with the Clerk of the Court, a copy with Judge MacMahon, and copies have been mailed to counsel.

Any objections to this report and any application to the Court for action upon the report shall be made in accordance with Rule 53(e)(2).

Dated: New York, New York
February 14, 1977

Martin D. Jacobs

Martin D. Jacobs
United States Magistrate

Plaintiff's Order to Show Cause,
Issued February 18, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MAGNALEASING, INC.,

Plaintiff,

-against-

74 Civ. 5593
(LFM)

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,

ORDER TO SHOW CAUSE

Defendants.
----------x

Upon the affidavit of Thomas A. Butler, Esq. sworn to the 17th day of February, 1977, the exhibits attached hereto including the report of Magistrate Martin D. Jacobs, Special Master, dated February 14, 1977 and the accompanying memorandum of law it is

ORDERED that the defendants, Staten Island Mall, Blackfriars Realty Corp. and Tottenham Realty Corp. show cause before the Honorable Lloyd F. MacMahon in Room 307, United States Court House, Foley Square, 40 Centre Street, New York, New York, on the 1st day of March, 1977, at 2 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard why an order should not be made by this Court pursuant to Rule 53(e)(2) of the Federal Rules Of Civil Procedure adopting as its own the report of the Special Master, dated

Plaintiff's Order to Show Cause
Issued February 18, 1977

February 14, 1977 and the findings of fact and conclusion of law contained therein and

IT IS FURTHER ORDERED that service of a copy of this order and of the papers upon which its same is granted, on Marshall, Bratter, Green, Allison & Tucker, attorneys for defendants, at their offices, 430 Park Avenue, New York, New York, on or before [illegible], 1977 shall be sufficient service of this order.

Dated: New York, New York
February ~~17~~ 18, 1977

[illegible]
U.S.D.J.

Affidavit of Thomas A. Butler, Sworn to February 17, 1977, in Support of Plaintiff's Motion to Confirm Magistrate Jacobs' Report

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MAGNALEASING, INC.,

Plaintiff,

-against-

74 Civ. 5593 (LFM)

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,

AFFIDAVIT

Defendants.
----------x

COUNTY OF NEW YORK
ss.:
STATE OF NEW YORK

Thomas A. Butler, being duly sworn deposes and says:

1. I am a member of the bar of this Court and of the firm of Keane & Butler, attorneys for the plaintiff. I make this affidavit in support of plaintiff's motion, brought on by order to show cause, for an order by this Court pursuant to Rule 53(e)(2) of the Federal Rules of Civil Procedure adopting as its own the report of the Special Master, Magistrate Martin D. Jacobs, dated February 14, 1977, and the findings of fact and conclusions of law contained therein. A copy of the report is annexed hereto as Exhibit A.

2. This action is for recission of plaintiff's lease at the shopping center known as the Staten Island Mall (the "Mall"), and for damages on grounds that plaintiff had been

induced to enter into its lease at the Mall by defendants' fraudulent representations. In its decision dated June 30, 1976 the Court granted plaintiff recission of its lease and referred the matter to Magistrate Martin D. Jacobs, as Special Master, to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff.

3. In his report Magistrate Jacobs found that plaintiff is entitled to damages of $156,769.99 with interest from September 1, 1976.

4. This motion is brought on by order to show cause because plaintiff must reduce its award of damages to a judgment and obtain a lien on defendants' property, the Staten Island Mall immediately or its award of damages will be rendered meaningless.

5. Defendant Staten Island Mall is a joint venture composed of defendants Tottenham Realty Corp. and Blackfriars Realty Corp. Defendants' principal asset, if not its only asset, is the Mall. The mortgagee of the Mall, the Chase Manhattan Mortgage and Realty Trust ("Chase Trust"), has commenced an action to foreclose its mortgage. This action, Heck v. Tottenham Realty Corp., Index Nos. 442/76 and 443/76 is presently pending in the Supreme Court of the State of New York, County of Richmond. By order dated April 20, 1976 a receiver was appointed for the pendency of the foreclosure action.

Affidavit of Thomas A. Butler, Sworn
to February 17, 1977

6. On January 17, 1977 the Chase Trust and the defendants entered into an agreement whereby Chase Trust took possession of the Mall, as a mortgagee-in-possession and defendants admitted that they were in default under the mortgage. A copy of such stipulation is attached hereto as Exhibit B.

7. On January 31, 1977 Justice John A. Garbarino of the Supreme Court of the State of New York, County of Richmond granted an order relieving the receiver of his duties. A copy of said order is attached hereto as Exhibit C. In the affidavit of John A. Machleder, Esq. in support of the application to relieve the receiver it is stated "Chase Trust expects shortly to be in a position to seek a final judgment in its favor herein." Affiant verily believes that the completion of the foreclosure is imminent. (Affidavit of Machleder ¶8) A copy of the affidavit is attached hereto as Exhibit D.

8. Affiant has been informed that preparatory to settling the foreclosure action defendants are entering into settlement agreements with parties having liens against the Staten Island Mall pursuant to which payments are to be made by defendants to said lien holders.

9. Affiant has been informed that the settlement of the foreclosure action will include a substantial payment to Feist and Feist, a principal shareholder of the defendants'

Affidavit of Thomas A. Butler, Sworn
to February 17, 1977

corporations. A judgment in this action may enable us to prevent this transfer of assets and preserve these funds to satisfy it. If the transfer is made before a judgment is entered, Magnaleasing may be forever prevented from obtaining any such assets.

10. Plaintiff is faced with the immediate danger that it will be deprived, in the immediate future, of the only property from which plaintiff can satisfy its judgment. It is therefore crucial that this motion be set down to be heard as soon as possible.

11. No prior request for the relief sought herein has been made.

WHEREFORE, plaintiff moves for an order adopting the report of Martin D. Jacobs, Special Master, dated February 14, 1977 and the findings of fact and conclusions of law contained therein, and requests that this court grant plaintiff's request that this motion be brought on by order to show cause.

Thomas A. Butler
THOMAS A. BUTLER

Sworn to before me this
17th day of February, 1977

Lon S Bannett

LON S. BANNETT
Notary Public, State of New York
No. 24-461[illegible]
Qualified in Kings Co
Commission Expires March [illegible], 1977

Exhibit A

Exhibit A to Thomas Butler's Affidavit is Magistrate Jacobs' Report, dated February 14, 1977, which appears on page 52a of this Joint Appendix, Volume I.

Exhibit B, January 17, 1977 Agreement among Chase Trust, Blackfriars, Tottenham Realty Corp., Staten Island Mall and Feist & Feist Designating Chase Trust as Mortgagee-in-Possession

A G R E E M E N T

AGREEMENT, dated January 17, 1977 ("Agreement") by and among the TRUSTEES OF CHASE MANHATTAN MORTGAGE AND REALTY TRUST ("Chase Trust"), a business trust organized and existing pursuant to the laws of the Commonwealth of Massachusetts under a declaration of trust dated April 16, 1970, as amended, having offices at One Pennsylvania Plaza, New York, New York, BLACKFRIARS REALTY CORP. ("Blackfriars"), a corporation organized and existing pursuant to the laws of the state of New York, with offices at 90 Park Avenue, New York, New York, TOTTENHAM REALTY CORP. ("Tottenham"), a corporation organized and existing pursuant to the laws of the State of New York, with offices at 90 Park Avenue, New York, New York, STATEN ISLAND MALL ("SIM"), a joint venture consisting of Tottenham and Blackfriars pursuant to agreement dated December 28, 1969 as amended by agreement dated November 28, 1973, with offices at 90 Park Avenue, New York, New York and FEIST & FEIST ("Feist"), a corporation organized and existing pursuant to the laws of the State of New Jersey, with offices at 58 Park Place, Newark, New Jersey.

W I T N E S S E T H :

WHEREAS:

I. SIM is the owner of a regional shopping center, convenience center, and adjoining vacant land located in the County of Richmond, City and State of New York, known as the Staten Island Mall (the "Mall").

Exhibit B.

II. Feist was designated as managing agent and exclusive leasing agent for the Mall pursuant to a certain Amended and Restated Management and Leasing Agreement dated as of December 18, 1969 as thereafter amended between SIM and Feist which agreement is perpetual in duration (the "Management & Leasing Agreement").

III. Chase Trust is the holder of certain notes secured by mortgages of record on the Mall in the aggregate principal amount of $39.25 million.

IV. A. Chase Trust has heretofore commenced two actions to foreclose certain of the aforesaid mortgages in the Supreme Court of the State of New York, County of Richmond, entitled Adam C. Heck et al. as Trustees of Chase Manhattan Mortgage and Realty Trust v. Tottenham Realty Corp. and Blackfriars Realty Corp. d/b/a Staten Island Mall, et al. [Index No. 442/76], and Adam C. Heck et al. as Trustees of Chase Manhattan Mortgage and Realty Trust v. Tottenham Realty Corp. and Blackfriars Realty Corp. d/b/a Staten Island Mall, et al. [Index No. 443/76] (collectively referred to as the "Foreclosure Actions").

B. Tottenham, Blackfriars, SIM and Feist are sued as defendants in the Foreclosure Actions.

C. Chase Trust has alleged in the Foreclosure Actions, and the aforementioned defendants have admitted, that the mortgagor has defaulted under the mortgages and the building loan agreements in that it failed to make payments of interest for the period from January 1, 1975 and failed to make any pay-

Exhibit B

ments of principal as required thereunder.

NOW, THEREFORE, in consideration of the premises and and other good and valuable consideration, the parties agree as follows:

1. Mortgagee-in-Possession.

A. SIM, Blackfriars, Tottenham and Feist hereby irrevocably authorize Chase Trust to take possession of the Mall at any time after the date hereof, personally, or by its trustees, officers, employees, servants, agents (including managing agentsand/or independent contractors) or attorneys, and to do all things, from time to time, which in its sole discretion and judgment it deems necessary or desirable to use, operate, manage, maintain and control the Mall and conduct the business thereof, either directly or through managing agents or independent contractors, including without limitation, the right to:

(a) make leases, licenses and other agreements, and grant easements affecting the whole or any part of the Mall;

(b) modify (by adjustment of rent or otherwise), extend, renew, cancel or accept cancellation of leases, licenses and other agreements heretofore or hereafter made, and enter into and consummate settlement negotiations with

Exhibit B

tenants, licensees and occupants of the Mall and their attorneys;

(c) bill, collect and receive all rents, earnings, revenues, issues, profits proceeds of insurance, condemnation awards, real estate tax refunds, and income of the Mall and every part thereof of every kind, nature and source which may have accrued and remain uncollected as of the date hereof and which may hereafter become due and payable (the "receipts") as well as make demand, assert claims and institute and defend any actions and proceedings relating thereto, including without limitation, summary proceedings;

(d) pay any and all carrying charges and expenses of the Mall as it in its sole judgment shall determine to pay, whether incurred prior or subsequent hereto, including, but not limited to, insurance premiums, real estate taxes and assessments, water rents and sewer charges,

Exhibit B

utility charges, payroll and fringe benefits, management fees, fees and charges of independent contractors, renting commissions, receiver's fees and commissions, costs of supplies, equipment, ordinary and extraordinary repairs and improvements (whether or not the same shall be capital expenditures), payments to contractors, subcontractors, engineers, architects, vendors and suppliers of the Mall, and the reasonable compensation of Chase Trust's employees, servants, agents and attorneys directly engaged and employed in connection with the purposes set forth herein, and incur such other and further expenses as it may deem necessary and appropriate to implement the terms hereof (the "expenses");

(e) maintain, repair, restore as necessary, alter, change, replace and improve the Mall and any part thereof as it may consider advisable;

Exhibit B

(f) continue, modify, extend, replace or cancel existing policies of insurance and obtain new policies in such amounts and effecting such coverage as it deems appropriate or desirable;

(g) advertise and promote the Mall;

(h) continue, modify, extend, cancel and make new contracts and agreements for the repair, maintenance, cleaning, furnishing of services and supplies to the Mall and otherwise in connection with the use, operation, maintenance, management, repair, alteration, improvement, replacement and restoration of the Mall;

(i) obtain and deliver such undertakings, sureties and bonds as it may deem necessary and appropriate in connection with the matters covered herein;

(j) grant rent concessions or abatements, compromise claims, seek to enforce any and all rights,

contracts, leases and agreements of the Mall or of SIM, Blackfriars, Tottenham, or Feist relating to the Mall, and institute, seek to intervene in, and defend such actions and proceedings as it shall deem advisable; and

(k) otherwise to manage and operate the Mall, carry on the business thereof, exercise all rights and powers with respect thereto, and generally to perform any and all such acts as SIM, Blackfriars, Tottenham, or Feist might do or perform as the fee title owners of the Mall and as exclusive managing and rental agents thereof, as in its sole and exclusive judgment it may deem necessary, proper or desirable to the same extent as if Chase Trust were the owner of the Mall.

B. Chase Trust shall apply the receipts first to the payment of the expenses of the Mall as defined in sub-paragraph (d) above, and then, in such order of priority

as Chase Trust shall determine, to the payment of principal, interest, and any other sums (including, but not limited to, real estate taxes advanced by Chase Trust) due and payable under the mortgages and to Chase Trust's costs and expenses incurred in connection with the Foreclosure Actions; provided, however, that Chase Trust shall have no obligation to pay expenses incurred on or prior to April 20, 1976.

C. Chase Trust shall have the right to execute, for any term of years, any lease, license agreement, easement or other instrument affecting the Mall in its own name, as mortgagee-in-possession, and any such document so executed shall have the same force and effect as if it had been executed by SIM, Blackfriars, Tottenham and Feist (it being understood, however, that SIM, Blackfriars, Tottenham and Feist shall not be liable or obligated under any such document signed by Chase Trust).

D. SIM, Blackfriars, Tottenham, and Feist, individually and collectively, hereby irrevocably agree not to seek or obtain any damages or enforce any claim against Chase Trust with respect to the management and operation of the Mall by Chase Trust pursuant to the provisions of this Agreement.

E. Nothing contained in this Agreement shall be deemed or construed by the parties hereto, by any third party or by any court as creating a relationship of principal and agent or of partners or of joint venture between the parties hereto, nor shall any acts of the parties be deemed to create any relationship other than the relation-

ship of mortgagee and mortgagor.

2. Parties in Interest.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, legal representatives and assigns. This Agreement does not and shall not be deemed to confer any third party beneficiary rights. The Declaration of Trust establishing Chase Trust, dated April 16, 1970, a copy of which together with all amendments thereto (the "Declaration") is on file in the office of the Secretary of the Commonwealth of Massachusetts, provides that the name "Chase Manhattan Mortgage and Realty Trust" refers to the trustees under the Declaration as trustees but not personally and no trustee, shareholder, officer, employee or agent of Chase Trust shall be held to any personal liability, nor shall resort be had to their private property for the satisfaction of any obligation or claim or otherwise in connection with the affairs of Chase Trust, but the Trust property only shall be liable.

3. Execution of Further Instruments.

Each of the parties shall execute, acknowledge and deliver all such further instruments, agreements, consents, releases and other documents as shall be reasonably required in order to carry out the intent of this Agreement.

4. Law Governing.

This Agreement is made in the State of New York and is to be governed and interpreted under and in accordance with the laws of said state.

Exhibit B

5. Notices.

Any notice, request or demand required or permitted to be given by any of the parties hereunder shall be in writing and shall be given by registered or certified mail, return receipt requested, postage prepaid, to the appropriate party at the address set forth on the first page of this Agreement or to such other address as any party may designate by notice to all other parties given in accordance with the provisions hereof. Any such notice, request or demand shall be deemed to have been given on the date mailed, unless mailed outside of the State of New York in which case it shall be deemed to have been given on the expiration of three business days after mailing. If any notice, request or demand is given by any party to Chase Trust, a copy thereof shall be given simultaneously to Wien, Lane & Malkin, 60 East 42nd Street, New York, New York 10017, or to such other attorneys as Chase Trust shall designate, and if any notice, request or demand is given by Chase Trust to any other party hereto, a copy thereof shall be given simultaneously to Marshall, Bratter, Greene, Allison & Tucker, 430 Park Avenue, New York, New York 10022, or to such other attorneys as such parties shall designate.

6. Modification of Agreement.

This Agreement may not be modified, amended or changed except by a writing signed by all of the parties affected by any modification, amendment or change, and may

Exhibit B

not be terminated except by a writing signed by all of the parties hereto. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed to be an original, but such counterparts together shall constitute one and the same agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

CHASE MANHATTAN MORTGAGE AND REALTY TRUST

By _____
A Trustee

BLACKFRIARS REALTY CORP.

By _____
President

TOTTENHAM REALTY CORP.

By _____
President

STATEN ISLAND MALL
By Blackfriars Realty Corp.

By _____
President

FEIST & FEIST

By _____
President

Exhibit B

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On January 19, 1977, before me personally came Hal J. Upbin to me known, and know to me to be a Trustee of CHASE MANHATTAN MORTGAGE AND REALTY TRUST described in, and who executed the foregoing instrument, and duly acknowledged to me that he executed the same as Trustee and not individually and for and on behalf of said Trust.

Howard N. Gorham

HOWARD N. GORHAM
Notary Public, State of
No. 60-6601790
Qualified in Westchester County
Commission Expires March 30, 1978

Exhibit C, Order by Hon. John A. Garbarino Relieving John P. Connors from Further Duty as Receiver of Staten Island Mall

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of Richmond, at the County Courthouse, St. George, Staten Island, New York on the 31st day of January, 1977.

P R E S E N T :

HON. JOHN J. GARBARINO,

Justice.

- -x

ADAM C. HECK, et al., : Index No. 442/76

Plaintiffs,

-against- : ORDER

TOTTENHAM REALTY CORP., et al., :

Defendants.

- -x

Upon reading and filing the order dated April 20, 1976 appointing John P. Connors of 27 William Street, New York, New York Receiver for the benefit of plaintiffs of the mortgaged property described in the complaint, known as the Staten Island Mall, in the City of New York, County of Richmond, State of New York, the affidavit of Robert A. Machleder, Esq., sworn to January 26, 1977, the exhibits attached thereto, the stipulation, dated January , 1977, by and between plaintiff Chase Manhattan Mortgage and Realty

Exhibit C

the satisfaction of the Court that the said John P. Connors, Receiver was duly appointed Receiver of the said mortgaged property and that good reason exists why the said John P. Connors should be ~~allowed to resign and~~ be ~~discharged~~ relieved as such Receiver, now on motion of Wien, Lane & Malkin, attorneys for plaintiffs, it is

ORDERED that the said John P. Connors, Receiver be and he hereby is ~~discharged~~ relieved from any further duty and office as such Receiver ~~except as hereinafter set forth~~ as of January 31st, 1977, except as hereinafter set forth; and it is further

~~ORDERED that the said John P. Connors turn over to Chase~~ Trust any and all funds, receivables, leases, contracts, agreements, operating records and other documents now in his custody or control which have come into his hands as said Receiver or regarding or pertaining to the operation and maintenance of the mortgaged ~~property, and it is further~~

ORDERED that the said John P. Connors prepare and submit to the Court a final accounting for his acts and proceedings as such Receiver upon notice to all proper parties, for the purpose of approving his accounting, determining his fee and allowances, ~~and~~ for ~~E N T E R~~ a final order discharging the receiver and cancelling the surety bond, and for a final disposition of any funds remaining in the possession of the receiver. ~~Ree.~~

J. S. C.

GRANTED
January 31, 1977
Augustus A. Cox CLERK

ENTER

J.S.C.

BEST COPY AVAILABLE

Exhibit D, Affidavit by Robert Machleder, Sworn to January 26, 1977, in support of application by Chase Trust to discharge John P. Connors

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
- -x

ADAM C. HECK, et al.,

Plaintiffs,

Index No. 442/76

-against-

TOTTENHAM REALTY CORP., et al.,

Defendants.

AFFIDAVIT

- -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT A. MACHLEDER, being duly sworn, deposes and says:

PRELIMINARY STATEMENT

1. I am a member of Wien, Lane & Malkin, attorneys for plaintiff Chase Manhattan Mortgage and Realty Trust ("Chase Trust") and I am fully familiar with the facts and circumstances herein. I submit this affidavit in support of this application

Exhibit D

by Chase Trust to permit John P. Connors, Receiver of the mortgaged property herein, to be discharged from any further duties.

NATURE OF ACTION

2. Chase Trust commenced this action on April 14, 1976 to foreclose its mortgages in the sum of $34.5 million on the property located in Richmond County, New York and known as the Staten Island Mall (the "Property"). A copy of the complaint is attached hereto as Exhibit A.

3. On April 20, 1976, upon the application of Chase Trust and pursuant to the subject mortgages, this Court (Garbarino, J.) appointed John P. Connors of 27 William Street, New York, New York ("Connors") as Receiver for the benefit of Chase Trust and directed that he file with the Richmond County Clerk an undertaking in the penal sum of $1 million. A copy of the order appointing Connors is attached hereto as Exhibit B.

4. Connors thereafter filed the required undertaking and undertook to act as Receiver of the Property. He continues to so serve at the present time.

Exhibit D

THIS APPLICATION

5. The Property is owned by defendants Tottenham Realty Corp. and Blackfriars Realty Corp., doing business as Staten Island Mall, a joint venture (the "Mortgagor").

6. Chase Trust and the Mortgagor have entered into a written agreement, dated January 17, 1977, in which the Mortgagor has irrevocably authorized Chase Trust to take possession of the Property as mortgagee-in-possession. The agreement authorizes Chase Trust to undertake all the duties now entrusted to Connors, and additional management functions such as leasing, advertising and other promotional ventures in order to increase revenues at the Property. A copy of the Agreement is attached hereto as Exhibit C.

7. Connors has entered into a stipulation with Chase Trust agreeing to his discharge as Receiver, and agreeing to turn over to Chase Trust all of the funds and documents required to enable Chase Trust to implement the Agreement and undertake management of the Property. It also provides for the prompt rendition of an accounting by Connors. A copy of the stipulation is attached hereto as Exhibit D.

Exhibit D

8. Chase Trust expects shortly to be in a position to seek a final judgment in its favor herein. At the present time, in order that Chase Trust may directly protect its interest in the Property and provide for an orderly transition of its management and operation, it is respectfully urged that the stipulation be honored by the Court and that Connors be discharged as provided by the attached order.

9. No previous application has been made for the requested relief before this or any other Court.

WHEREFORE it is respectfully requested that the motion of Chase Trust be in all respects granted and that the Court grant such other and further relief as may seem just or appropriate in the circumstances.

Robert A. Machleder

sworn to before me
this 26th day of January 1977.

Notary Public

ROBERT GARY SMITH
Notary Public, State of New York
No. [illegible]7
Qualified in [illegible] County
Commission Expires [illegible] 30, 1976

Defendants' Objections to the Special Master's Report and Memorandum of Law in Opposition to Plaintiff's Motion to Confirm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MAGNALEASING, INC.,

Plaintiff,

74 Civ. 5593 (LFM)

- against -

STATEN ISLAND MALL,
BLACKFRIARS REALTY CORP. and
TOTTENHAM REALTY CORP.,

Defendants.

----------x

DEFENDANTS' OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO CONFIRM

PRELIMINARY STATEMENT

This memorandum is submitted on behalf of Blackfriars Realty Corporation and Tottenham Realty Corporation, doing business as Staten Island Mall, a joint venture ("Mall"), defendants in the above-entitled action. It contains defendants' objections to the report, dated February 14, 1977 ("Report"), submitted by United States Magistrate Martin D. Jacobs and sets forth defendants' opposition to plaintiff's motion to confirm that Report.

Defendants' Objections to the Special Master's Report

Defendants respectfully contend that Magistrate Jacobs' Report should be rejected by this Court. It rests ultimately on findings of fact that are clearly erroneous in light of the evidence adduced, much of it undisputed. It draws erroneous legal conclusions from this same evidence.*

More specifically, defendants contend that Magnaleasing, Inc. ("Magnaleasing") is entitled to no damages. For one thing, the direction of a damages reference, effectively permitting plaintiff to re-open a case that had been closed for months, was itself unauthorized. For another thing and under substantive legal principles, Magnaleasing may not recover damages of defendants. Under New York law, damages are awarded to a plaintiff in a fraud action only where such plaintiff can demonstrate that it incurred out-of-pocket losses directly attributable to defendant's misconduct. In no meaningful sense can it fairly be said that Magnaleasing -- as opposed to its parent corporation, The Magnavox Company ("Magnavox") -- incurred any such losses.

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* Much of the Report is based on documentary evidence and other secondary references; as such, its findings are entitled to less weight and are subject to greater scrutiny. 5A Moore's Federal Practice ¶53.12, at 109 (1976-77 Supp.).

Moreover, Magnaleasing's particular claims for damages are intrinsically flawed. To award it damages for the increment in common area charges and tax rent paid above those levels represented to it in advance would effectively be to award it the "benefit of the bargain," a forbidden measure of damages for fraud under New York law. To award it damages for leasehold improvements made would be similarly improper in light of Magnaleasing's concession that it did not attempt to mitigate.

If, nonetheless, it is somehow decided that Magnaleasing is entitled to damages herein, defendants urge that the Court observe two salient principles that the Report does not: First, damages in a fraud case are given to reimburse a plaintiff for losses proximately caused by defendant's wrongdoing; as shown below, a portion of the overpayment Magnaleasing seeks herein is directly attributable to its own ineptitude, not to any misconduct laid to defendants. Second, if damages for overpayment are to be awarded, all parties concede that the relevant increment must be reduced by an appropriate inflation factor; in selecting that factor, the Court should focus on the pertinent comparative data, viz., to be sure to compare "apples" with "apples." Applying such principles, defendants contend that plaintiff's damages, if any, cannot exceed $10,708.78 as to common area overpayments and $24,897.35 as to tax rent overpayments.

Defendants' Objections to the Special Master's Report

FACTS

This action was tried before the Court, without a jury, on March 22, 23, and 24, 1976. At no time did plaintiff seek or obtain leave to bifurcate the trial, viz., to try the liability issue first, to leave the damages issue for another day. By memorandum decision filed July 6, 1976, the Court (per MacMahon, J.) granted plaintiff rescission of its lease with defendants. Presumably in view of the paucity of proof on the damages issue, the Court felt constrained to direct the reference that yielded, ultimately, the Report at issue herein.

The damages trial was held before Magistrate Jacobs on August 31 and November 4, 1976. Testimonial and documentary evidence was adduced; both are analyzed below. Following the submission of post-reference briefs, Magistrate Jacobs issued his Report. The Report concluded (at 10) that plaintiff "is entitled to damages of (a) $96,909 for improvements; (b) $38,799.91 for excess tax rent; and (c) $21,053.08 for excess common area rent, making a total of $156,769.99 with interest from September 1, 1976."

Defendants' Objections to the Special Master's Report

ARGUMENT

POINT I

THE REPORT'S WAIVER CONCLUSION IS MISPLACED

Defendants had objected to the reference at the very outset of the reference (DT. 4-9).* The Report rejected defendants' objections in part because it viewed them as untimely. Report at 3. With deference, we submit the Report is in error in this respect, not merely because defendants objected at the earliest practical moment, but because defendants' objections were principally directed to a more fundamental matter: the Court's reopening of the case itself.

Reopening the case on the damages issue three months after plaintiff had rested was improper.

This Court has termed the re-opening of a case after it has been closed a "pernicious practice," and where a party has not shown diligence in introducing proof, such reopening may be denied. Reconstruction Finance Corp. v. Commercial Union of America Corp., 123 F.Supp. 748, 750 (S.D.N.Y. 1954).

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* Citations to the damages transcript are preceded by DT.

"The time for testing of proof is the time of trial." Locklin v. Switzer Bros., 299 F.2d 160, 169 (9th Cir. 1961), cert den., 369 U.S. 861 (1962). In light of plaintiff Magnaleasing's position (DT. 11) that there was sufficient evidence in the trial record on which to base a damages award, "it is not given to a judge to engage in a prospecting quest for other evidence" by reopening, on his own motion, a case to receive further evidence. Arthur Murray, Inc. v. Oliver, 364 F.2d 28 (8th Cir. 1966).

If a party seeks reopening to introduce new evidence at the time the trial court is to render its decision, such reopening may only be appropriate if the stringent standards for granting a new trial are met -- the new evidence was unknown at the time of trial, and/or was excusably neglected. Fed.R.Civ.P. 59; 6A Moore's Federal Practice ¶59.04[13] (1974 ed.).

On March 23, 1976, after two full days of putting on its case, instant plaintiff rested (DT. 4; TT. 275*). Later that day, the defense rested (DT. 4; TT. 289). Thereupon,

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* Reference to the transcript of the trial before Judge MacMahon are preceded by "TT."

plaintiff declined the Court's offer of the opportunity of rebuttal (id.). On this record, it was clearly improper for the Court to conduct plaintiff's case: for the Court to order - sua sponte, by decision rendered three months after closing arguments - the reopening of the case and the introduction of further evidence on damages. For if, as plaintiff's counsel insists, sufficient evidence of damages had already been introduced, reopening by the court was an improper "prospecting quest" by the Court. Arthur Murray, Inc. v. Oliver, supra. If, however, there was insufficient evidence of damages at trial, plaintiff's neglect in introducing such evidence has never explained and is clearly inexcusable, see Reconstruction Finance Corp. v. Commercial Union of America, supra. In either event, reopening was unwarranted.

Plaintiff had argued before Magistrate Jacobs that defendants had waived their right to object to the reference. While, as shown below, this argument is unavailing with respect to the propriety of directing a reference under Rule 53, Fed.R.Civ.P., it cannot in any event defeat defendants' objection to the Court's sua sponte reopening the record long after plaintiff had rested. See, e.g., Arthur Murray, Inc. v. Oliver, supra, one of many cases that clearly dis-

tinguishes between a court's authority and discretion to reopen a case and to order a reference.

The reference was improper.

Rule 53(b), Fed. R. Civ. P., states that a reference is proper only in very limited situations:

> "A reference to a master shall be the exception and not the rule.... [I]n actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."

While Judge MacMahon's decision recited that "the issue of the amount of damages... is complex and will involve matters of accounting", the instant case does not in fact involve determination of those issues for which a reference is classically appropriate. See Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. 779 (1975), text at notes 102-103, and cases cited. With no disrespect intended toward the Magistrate, there were neither sophisticated accounting matters to wrestle with nor complicated computations to effect. In sum and in light of Rule 53(b), the reference was improper.

Defendants' Objections to the Special Master's Report

Notwithstanding the Report's conclusion (at 3), defendants have not waived their rights to object to the reference. In the first moments of the first hearing before Magistrate Jacobs, counsel for defendants objected to the reference (DT. 4-10) on the grounds that it was unauthorized. Objecting before the special referee in the first instance has been recognized as a proper method of preserving the objection to the reference. See, Diamond Doors Co. v. Lane-Stanton Lumber Co., 505 F.2d 1199, 1206 (9th Cir. 1974). In Cruz v. Hanck, 515 F.2d 322, 331 (5th Cir. 1975), cert. den. 424 U.S. 917 (1976), the Court explained why waiver would be found where objection was first raised on appeal:

> "A party objecting to a reference should do so prior to or at the time of the reference.... [S]uch procedure permits the proper and efficient administration of the judicial process. Otherwise, a party disappointed with a master's report would be able to obtain 'a second bite at the apple' by withholding his objection to the reference until after the report." (emphasis added)

As shown above, instant defendants objected "at the time of the reference." Accordingly, the rationale that underlies a finding of waiver is patently inapplicable herein. Cruz v. Hanck, supra. It is not defendants, but plaintiff who has received "a second bite at the apple." It was plain-

tiff who was given, by judicial grace, an additional opportunity to present evidence of damages. The reference was as unauthorized as the Court's threshold decision to reopen the case itself.

POINT II

UNDER SUBSTANTIVE LEGAL PRINCIPLES, MAGNA-LEASING IS ENTITLED TO NO DAMAGES

The applicable legal principles seem not fairly disputable. A brief review is instructive: Plaintiff has the burden of proving the extent of his injury and the amount of his damages and must do so by the presentation of competent evidence. Toho Bussan Kaisha, Limited v. American President Lines, Limited, 265 F.2d 418, 422 (2d Cir. 1959)(applying New York law); Dunkel v. McDonald, 272 App.Div. 267, 70 N.Y.S.2d 653, 656 (1st Dept. 1947), aff'd, 298 N.Y. 586 (1948); 13 N.Y. Jur. Damages ¶2, at 421. Such damages may not exceed the actual loss sustained. France and Canada Steamship Corporation v. The Berwind-White Coal Mining Company, 229 N.Y. 89, 95 (1920). In fraud actions, "[t]he true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong [citation omitted]." Reno v. Bull, 226 N.Y. 546, 553 (1919); see also, Hanlon v. Macfadden Publications, Inc., 302 N.Y. 502, 511 (1951). Recovery does not extend to the "benefit of the bargain" that would have been earned had the contract been realized, i.e., had the representations proven true. See, e.g., Babylon Milk & Cream Co., Inc. v. Rosenbush, 233 F.Supp. 735, 737 (E.D.N.Y. 1964)(applying New York law); Sager v.

Friedman, 270 N.Y. 472, 481 (1936). Finally, one who is injured by the wrongful act of another must exercise reasonable efforts to mitigate his damages and will be denied recovery for loss chargeable to his failure to do so. Mayes Company, Inc. v. State, 18 N.Y.2d 549, 554, 277 N.Y.S.2d 393, 397 (1966); 13 N.Y. Jur. Damages §13, at 451.

Applying these principles to the case at bar and placing substance over form, we contend that the Report erred in recommending an award of damages to plaintiff, since the out-of-pocket losses, if any, attributable to defendants' misconduct were incurred by Magnavox, not by Magnaleasing. The evidence adduced at the reference shows that Magnaleasing was what plaintiff's own Henry Grenesko testified it was:

> THE SPECIAL MASTER: Would you say that Magnaleasing regards itself as a division or branch of Magnavox?
>
> THE WITNESS: Yes, I do, your Honor.
>
> THE SPECIAL MASTER: In essence, isn't that what it really is?
>
> THE WITNESS: It really is a division of Magnavox. In the same way we have other divisions. (DT. 88)*

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* Mr. Grenesko testified (DT. 28) that he had been employed by Magnavox for ten years and that he had been Magnaleasing coordinator from August, 1973 to approximately December, 1974.

The specific data adduced confirms Grenesko's judgment and shows therefore that in "real world" terms, it was Magnavox, not Magnaleasing, that incurred the losses complained of, viz. that constructed the store, that paid the rent:

- Magnaleasing does not have and never has had any employees (DT. 168);

- Magnaleasing does not have and never has had a bank account (DT. 87);

- All rent and additional rent payments to Mall were made by Magnavox checks drawn on a Magnavox bank account (id.);

- All payments to contractors for constructing and fixturing the store were made by Magnavox checks drawn on a Magnavox bank account (DT. 32);

- Ninety-five percent of Magnaleasing's income was provided it by Magnavox (DT. 93);

- Magnaleasing has performed no functions whatever since 1974 (DT. 85);

Defendants' Objections to the Special Master's Report

- Until July, 1976, the corporate books and records showed that Magnaleasing owed Magnavox $464,215 (DT. 128), representing sums advanced Magnaleasing by Magnavox (DT. 90-91); Magnavox's Grenesko testified that Magnaleasing had never been called upon to repay the money "set aside" by Magnavox and that he was unaware of any intention by Magnaleasing ever to repay such money (DT. 91).*

In sum, Magnaleasing cannot claim the indemnification rights that damages for fraud provide. It cannot claim such rights because -- again, putting substance over form -- it did not incur such losses. To the extent that Magnavox, which is not before the Court, persists in advancing the claim of its wholly-owned subsidiary, it is impermissibly seeking to pierce its own "corporate veil." In this respect, a recent statement by Judge MacMahon is instructive:

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* Although the September 24, 1976 affidavit (Plaintiff's Reference Ex. 12) of a Magnavox accountant, Phyllis Blank, recited (¶3) that since July, 1976, the books and records showed Magnavox owing Magnaleasing $23,186, subsequent testimony demonstrated that Magnaleasing has not actually repaid so much as one dollar to Magnavox. As of September 30, 1976, Magnaleasing had suffered pre-tax losses of $883,235 (DT. 151); Defendants' Reference Ex. C, at 11. Magnaleasing's losses thus generated corporate income tax savings in excess of $400,000, which savings were promptly enjoyed by Magnavox (DT. 155).

> '[T]he corporate veil is never pierced for the benefit of the corporation or its stockholders. The procedure is only permissible against a purported stockholder who is using the corporate veil to defraud.' Boise Cascade Corporation v. Wheeler, 419 F.Supp. 98, 102 (S.D.N.Y. 1976), quoting Colin v. Altman, 39 A.D.2d 200, 333 N.Y.S.2d 432, 433 (1st Dept. 1972)(emphasis added). *

Moreover, Magnaleasing's particular claims for damages are intrinsically flawed. As stated above, the New York courts have rejected the "benefit of the bargain" rule as the measure of damages in a fraud action in favor of indemnification for out-of-pocket expenditures directly attributable to defendant's misconduct. Babylon Milk & Cream Co., Inc. v. Rosenbush, supra; Sager v. Friedman, supra. Yet in recommending return of claimed overpayments for tax rent and common area charges, the Report sanctions precisely the proscribed "benefit of the bargain" recovery.

The analysis is straightforward: Respecting tax rent, plaintiff seeks recovery of all such rent** it paid above

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* Contrary to Magistrate Jacobs' conclusion (Report at 5), paragraph 59 of the parties' Joint Statement of Stipulated and Disputed Facts (Plaintiff's Reference Ex. 3) did no more than remove from the trial an inherently extraneous issue, viz., whether rent and additional rent due under the Lease had been paid in full. It was not intended and did not purport to speak to the issue of who had paid such rent and additional rent.

** Under Section 4.1B of Magnaleasing's lease ("Lease") (Plaintiff's Reference Ex. 5), both tax rent and common area charges are additional rent.

the $1.00 per square foot per year Mall "falsely represented" -- actually, predicted -- would be owing (Plaintiff's Post Hearing Brief on Damages, at 6), less some amount for inflation. Respecting common area charges, plaintiff similarly seeks recovery of all such rent it paid above the $.60 per square foot per year Mall "falsely represented" -- again, predicted -- would be owing (id. at 8) less some amount for inflation.* Such a recovery would indeed give Magnaleasing the "benefit of the bargain" it claims to have struck with Mall's leasing representative, for it would effectively constitute enforcement of the very representations that plaintiff earlier relied upon to rescind its Lease with Mall. Put another way, to award such damages to Magnaleasing would be to rule that Magnaleasing was somehow privileged to do business and occupy space at the Staten Island Mall (the "Shopping Center") without having to pay the rent that legitimately fell due.** Conceptually, therefore, Magnaleasing's claim is analogous to one for lost

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* As to what constitutes that appropriate amount for inflation, the parties disagree significantly. See, infra.

** In this respect, it is critical to remember that plaintiff neither alleged nor proved that the common area charges and tax rent were not bona fide items under the Lease. It has neither alleged nor proved that the common area charges collected went other than toward the upkeep and maintenance of the Shopping Center; it has neither alleged nor proved that the tax rent collected went other than to New York City in payment of real estate taxes levied by the City.

profits, a proscribed measure of damages in fraud actions under New York law. See, e.g., Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F.Supp. 112, 132 (S.D.N.Y. 1974)(applying New York law), aff'd in part, rev'd in part on other grounds, 540 F.2d 27 (2d Cir. 1976); Ungewitter v. Toch, 31 A.D.2d 583, 294 N.Y.S.2d 1013 (3rd Dept. 1968), aff'd, 26 N.Y.2d 687, 308 N.Y.S.2d 858 (1970).

As to Magnaleasing's claim for the recovery of $96,909 in construction and fixturing costs, it is fatally flawed by plaintiff's dual concession (DT. 108-109) that no attempt was made to mitigate its loss and that such an attempt could have been productive. See, Olsen v. United States Fidelity and Guaranty Company, 230 N.Y. 31 (1920). To the extent that defendants bore the burden on this issue, they met that burden by eliciting the concession described above. While the Report is correct in concluding (at 7) that only "reasonable" steps need be taken to mitigate, it seems indisputable that one who makes no effort to mitigate has acted unreasonably. Magnaleasing admitted making no effort.

If, nonetheless, the Report is adopted insofar as it concludes that plaintiff is entitled to a recovery of moneys paid as tax rent and common area charges, such Report should

be modified to take into account two variables: the amount of such payments directly attributable not to defendants' misconduct but to plaintiff's inept negotiating; the appropriate measure of inflation by which payments for common area charges must concededly be reduced.

The "leased-leasable" distinction

Some tenants, including Magnaleasing, paid tax rent and common area charges as a function of the amount of space actually leased at the Shopping Center. See, sections 4.5B and 5.3A(ii) of Magnaleasing's Lease (Plaintiff's Reference Ex. 5). Other tenants, including Brooks Fashion Stores, Inc., paid tax rent and common area charges as a function of the amount of leasable space at the Shopping Center.* See, Defendants' Reference Ex. H. A tenant gets one clause or the other depending on whether he negotiates poorly or well. In times of full occupancy, there is no significance to the distinction between the two clauses since, by definition, the amount of leased space will equal the amount of leasable space. Given, however, the vacancy rate that has existed at the Shopping Center since it opened, the tenant who has a

* The parties had stipulated (Plaintiff's Reference Ex. 3, at ¶14) that the gross leasable area at the Shopping Center is 430,209.06 square feet.

"leased" clause will, of course, pay more than his counterpart with a "leasable."

The parties had stipulated (DT. 174-75) to the "leased-leasable" differential, expressed in dollars per square foot per year:

Common Area Charges

	"leasable" tenants	"leased" tenants
August 9, 1973 (the date the Shopping Center opened) to June 30, 1976 (the date Judge MacMahon granted rescission)	$1.97 per square foot per year	$2.58 per square foot per year

Tax Rent

August 9, 1973 to January 31, 1974	$1.36 per square foot per year	$2.45 per square foot per year
February 1, 1974 to January 31, 1975	$3.15 per square foot per year	$4.35 per square foot per year
February 1, 1975 to June 30, 1976	$4.87 per square foot per year	$6.04 per square foot per year

As discussed below, defendants' Reference Exhibits I-1 to I-7 and J-1 and J-2 both take note of the total dollar

amounts attributable to the "leased-leasable" distinction and by which, therefore, plaintiff's overpayment claims must be reduced. Defendants' exhibits also take into account the stipulated square footage of the Magnavox store, 3,626 square feet (Plaintiff's Reference Ex. 3, at ¶13); inadvertently, plaintiff's corresponding exhibits (7 and 7A, 8 and 8A) set forth calculations based on a square footage of 3,608 square feet.

Lest there be any doubt that plaintiff itself understands that it paid more tax rent and common area charges specifically because it bargained only for a "leased" clause, the testimony of Magnavox's John Kelly is dispositive:

> 'Question. Were you also paying a higher proportion of taxes because the denominator of the formula for the calculation of tax rent was ... leased or occupied space in the shopping center instead of leasable[?]
>
> . . .
>
> 'Answer. That is correct.
>
> . . .
>
> 'Question. Did you understand the formula for calculation of both tax rent[,] which appears in Section 4.5B of the [L]ease and also the formula with respect to common area charges[,] which appears in Section 5.3A[ii] and 5.3[B] of the [L]ease at the time that you signed the [L]ease?
>
> 'Answer. Yes.

> 'Question. Did you ever ask anybody connected with the Mall to modify either of the formulas to provide that the denominator would be leasable space as opposed to leased or occupied space?
>
> 'Answer. No.' (DT. 178-79).

In short, Magnavox paid some money -- again, the precise amounts are reflected in Defendants' Reference Exhibits I and J -- because it bargained poorly. Such expenditures were not caused, proximately or otherwise, by defendants' misconduct and cannot, therefore, be properly assessed against defendants herein. Insofar as the Report ignores the significance of the "leased-leasable" distinction, it is, we submit, mistaken.*

The appropriate inflation factor

Plaintiff concedes -- as does the Report -- that from its claim for overpaying tax rent and common area charges,

---

* Curiously, the Report appears to chide defendants for making this argument, noting that "[t]here would have been no difference between 'leased' and 'leasable' had the actual occupancy level been as represented." (at 8). With deference, this is a truism. The fact is that there has been a finding as to what was represented, and there is a difference between what "leased" tenants pay and what "leasable" tenants pay. It is the impact of this difference on Magnaleasing's damages claim that the Report overlooks.

it must subtract an appropriate sum for the incremental, inflationary costs that would ordinarily have been incurred. As to tax rent, the parties agree that the appropriate inflationary factor is the stipulated increase in the New York City real estate tax.*

As to the appropriate inflationary factor for common area charges, the parties are in fundamental disagreement. The Report concludes (at 9) that under all the circumstances of this case, a 15.5% annual inflation factor is appropriate. It recommends damages in the amount of $21,053.08 based on this assumption. Plaintiff had contended for a 10% figure, (Plaintiff's Post-Hearing Brief on Damages, at 8), since it exceeded the 8.7% annual inflation rate said to have been recorded by the Consumer Price Index for the New York Metropolitan Area.**

---

* Assuming that plaintiff is not permitted to recover that portion of the tax rent overpayments attributable to its "leased" clause, such damages properly amount to $24,897.35. Defendants' Reference Ex. J-2.

** Presumably, plaintiff had also contended that the 10% rate was "generous" because it exceeded the 8% and 5.3% rates increases said to have been incurred at two other malls. See, Plaintiff's Reference Ex. 13. The insufficiency of the chart proffered speaks for itself, even apart from considerations of bias. Its proponent, a Bond Stores representative, conceded (DT. 165) that he had prepared it on one day's notice, that Bond Stores is currently suing Staten Island Mall -- and is represented by Magnaleasing's counsel herein, Keane & Butler -- and that Bond Stores had not paid rent to Mall in seven months.

Defendants' Objections to the Special Master's Report

Defendants contend that the appropriate inflation rate for common area charges should be 48.7% per year. That figure stems from data appearing in the 1972 and 1975 editions of Dollars & Cents of Shopping Centers, a tri-annual publication of the Urban Land Institute. We refer in particular to Defendants' Reference Ex. E, consisting of Table 2-2 (from the 1972 edition) and Table 4-2 (from the 1975 edition). Each table is entitled "Regional Shopping Centers in the Northeast Operating Results Per Square Foot of GLA [Gross Leasable Area]." We believe it not fairly contestable that such data offer a more intelligent measure of inflationary trends in common area charges than does the Consumer Price Index, which purports to do no more than to mark increases in milk, eggs, meat and other familiar household staples.

The 48.7% annual increase is derived as follows: In 1972, the pertinent common area charges amount was $.13 per square foot per year. This figure can be seen next to the entry entitled "common area charges," the fourth item from the top of Table 2-2 (Defendants' Reference Ex. E, at 1), and under the vertical column heading entitled "Middle-Range." The corresponding 1975 figure is $.32 per square foot per year, which can be found next to the entry entitled

"common area charges," the sixth item from the top of Table 4-2 (Defendants' Reference Ex. E, at 2), and under the vertical column heading entitled "Median." On an annual basis, the 146% increase from $.13 to $.32 is, of course, equivalent to 48.7% during each of the three years surveyed.

It is critical to understand why one must look to the "middle-range" column on the 1972 survey. What the 1972 survey termed "median" was a northeast regional shopping center 604,577 square feet in area. See, entry entitled "Gross Leasable Area," first item from the top of Table 2-2 (Defendants' Reference Ex. E, at 1). Since the Staten Island Mall consists of approximately 430,000 square feet of gross leasable area (Plaintiff's Reference Ex. 3, at ¶14), it is readily apparent that a closer comparison may indeed be found by examining the initial data under the "middle-range" column, defined as consisting of shopping centers 470,047 square feet in area.

By contrast, the pertinent data from the 1975 survey (Table 4-2, Defendants' Reference Ex. E, at 2) may be found under the "median" column heading, since by 1975, the "median" gross leasable area was defined to be 410,965 square feet, i.e., a reasonably close approximation of the Staten Island Mall.

Defendants' Objections to the Special Master's Report

Incredibly, plaintiff labels as "arbitrar[y]" (Brief in Support of Motion to Confirm, at 4), defendants' insistence that a meaningful comparison can be had only by looking to statistics drawn from shopping centers comparable in size to the Staten Island Mall. As shown above, in the 1972 survey, such data can be found under the "middle-range" column; in the 1975 survey, such data can be found under the "median" column.

In short, the Report's acceptance of plaintiff's presentation of the Urban Land Institute statistics is clearly erroneous, since the Reference Exhibits (Plaintiff's Revised Schedules 7 and 7A, No. 2) that purport to embody the data improperly perceive a 15.5% inflationary factor. The Report arrived at this 15.5% figure by mechanistically comparing the 1972 "median" with the 1975 "median," a comparison, we have shown, between "apples" and "oranges."

To translate the appropriate Urban Land Institute data into dollars and cents: Assuming a 48.7% annual increase in common area charges and assuming further that plaintiff may recover no more than tenants shrewd enough to bargain for a "leasable" payment clause, Magnaleasing's damages are $10,708.78. Defendants' Reference Ex. I-7. If Magnaleasing

is also permitted to recover those payments for common area charges attributable to its having negotiated a "leased" clause, its damages would be $16,623.66. Defendants' Reference Ex. I-6.

An alternative inflationary factor for common area charges is an annual increase of 42.2%. This can be derived from examination of Defendants' Reference Ex. F, pages 1 and 2, surveying the operating results of one, two and three-year old enclosed regional malls.* Operating expenses of $.80 per square foot in 1972 jumped to $1.86 per square foot in 1975, for a 133% increase, or 42.2% per year.**

To convert the 42.2% annual inflation rate into dollars and cents: Plaintiff is entitled to $11,514.72 if not permitted to recover for the increment attributable to its

---

* The Staten Island Mall opened for business on August 9, 1973. Plaintiff's Reference Ex. 3, at ¶16.

** The $1.86 figure for 1975 (Defendants' Reference Ex. F, at 2) can be found next to the entry marked "Total Operating Expenses" and under the vertical column heading entitled "Upper Decile." In turn, "Upper Decile" is defined as malls consisting of 488,438 square feet of gross leasable area, the closest approximation given of Staten Island Mall's size.

BEST COPY AVAILABLE

Defendants' Objections to the Special Master's Report

"leased" payment clause. Defendants' Reference Ex. I-5. Plaintiff is entitled to $17,217.52 if it is permitted to recover for the increment attributable to the "leased" clause. Defendants' Reference Ex. I-4.

An arguable, if less exact, comparison may be found by comparing the corresponding entries for "Total Operating Expenses" in 1972 and 1975, Defendants' Reference Ex. E, at 1-2. Looking again, under the initial data under the "Middle-range" column for 1972 (Defendants' Reference Ex. E, at 1), we find total operating expenses to be $.83, less $.20 for real estate taxes, or $.63 per square foot per annum in 1972. By 1975, the corresponding amount is $1.10 per square foot per year, calculated by subtracting from the $1.49 shown as "total operating expenses" under "median" (Defendants' Reference Ex. E, at 2) the $.39 for real estate taxes. From $.63 per square foot per year in 1972 to $1.10 per square foot per year in 1975 is a 74.6% increase or 24.9% per year.

Under a 24.9% annual inflation rate, plaintiff would be entitled to $13,838.39 if not permitted to recover for the increment attributable to the "leased" clause (Defendants'

Reference Ex. I-3), $19,853.78 if it is permitted to recover such increment (Defendants' Reference Ex. I-2).*

---

* With one key exception, the 15.5% annual inflation rate embodied in plaintiff's Revised Schedule 7 and 7A, No. 2 is calculated in the same manner as was the 24.9% rate discussed above. The exception is that respecting Tables 2-2 and 4-2 (Defendants' Reference Ex. E, at 1-2), plaintiff looked in both instances under the "median" column, even though, as explained above, the 1972 "median" space footage -- 604,577 square feet -- far exceeds that of the Staten Island Mall.

CONCLUSION

For the reasons stated above, this Court should decline to adopt the Magistrate's Report and plaintiff should not be awarded damages from defendants. If, nevertheless, it is determined that plaintiff is entitled to damages, such damages should be measured in accordance with the principles set forth herein and should not exceed $10,708.78 respecting overpayments for common area charges and $24,897.35 respecting overpayments for tax rent.

Dated: New York, New York
February 28, 1977

Respectfully submitted,

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By James M Bergman
A Member of the Firm
Attorneys for Defendants
Blackfriars Realty Corporation and Tottenham Realty Corporation, doing business as Staten Island Mall, a joint venture
430 Park Avenue
New York, New York 10022
(212) 421-7200

Of Counsel:

Jeffrey Newman
Abraham Skoff

Affidavit by Lon Bannett, Sworn to March 4, 1977, in Answer to Defendants' Objections

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MAGNALEASING, INC.,

Plaintiff,

-against-

74 Civ. 5593
(LFM)

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,

AFFIDAVIT

Defendants.
----------x

COUNTY OF NEW YORK
ss.:
STATE OF NEW YORK

LON S. BANNETT, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and am associated with the firm of Keane & Butler, attorneys for the plaintiff. I make this affidavit in answer to defendants' objections to the report of the Special Master, Magistrate Martin D. Jacobs, dated February 14, 1977, and the findings of fact and conclusions of law contained therein. I have knowledge of the facts contained herein.

2. Judge MacMahon ordered this reference "to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff". Magistrate Jacobs found that plaintiff is entitled to damages of $156,769.99 with interest from September 1, 1976.

Affidavit by Lon Bannett, Sworn to March 4, 1977

3. Defendants have objected to the report, in part, because they assert that the Court's reference of this matter to Magistrate Jacobs for an accounting and computation of damages was improper.

4. F.R. Civ. P. Rule 53 provides that a court in a non-jury case may order a reference "in matters of accounts and of difficult computation of damages." Judge MacMahon stated in his opinion that he was ordering a reference because the amount of damages "is complex and will involve matters of accounting". Defendants contend that the trial record contains no evidence upon which damages could be computed and that the reference was not for the purpose of computing damages but to improperly allow plaintiff "an additional opportunity to present evidence of damages". (Defendants' objections at 10)*. Defendants also claim that they objected to the reference at "the very outset of the reference" (emphasis added) (Defendants' objections at 5).

5. The facts show that each of the defendants' contentions is false. The trial record contains all the evidence necessary to compute damages. The computation was sufficiently difficult to render appropriate the assistance of a magistrate.

* References to Defendants' Objections To The Special Master's Report And Memorandum Of Law in Opposition to Plaintiff's Motion to Confirm are cited as "Defendants' Objections at __"

The facts also show that while plaintiff at the reference relied solely on the facts introduced at trial to establish damages, defendants used the reference as an opportunity to raise and try new issues. Finally, the record shows that defendants consented to the reference, participated in it, and invoked its authority to gain additional post-trial discovery. Only after using it to their own advantage to obtain discovery did they object to the reference before Magistrate Jacobs. Defendants never brought their objections before the Court until the reference was complete and an award adverse to defendants rendered by Magistrate Jacobs.

6. Magistrate Jacob's report awards to plaintiff damages for (a) the improvements made to the Staten Island Mall store, (b) overpayment of real estate taxes and (c) overpayment of common area charges. The trial record contains sufficient evidence for the computation of damages with respect to each category of damages.

Facts as to Improvements

7. With respect to the improvement, Mr. Grenesko testified as to their original cost (Trial Transcript at 272), the rate at which they were depreciated by Magnaleasing (Trial Transcript at 272) and the period over which they had been depreciated up to and including the date of trial (id). Defendants did not introduce any evidence at trial disputing this testimony .

Affidavit by Lon Bannett, Sworn to March 4, 1977

Facts as to Real Estate Taxes and Common Area Charges

8. The facts necessary to compute plaintiff's overpayment of real estate taxes were stipulated to by the parties at trial in the Joint Statement of Stipulated Facts. These facts are as follows:

(a) The store plaintiff leased consisted of approximately 3,626 square feet of floor space (Joint Statement, ¶13);

(b) The Lease defines "Additional Rent" to include real estate taxes (Joint Statement, ¶38);

(c) On or about August 9, 1973, defendants rendered a statement to plaintiff estimating plaintiff's tax rent at $2.45 per square foot of floor space per year (Joint Statement, ¶64);

(d) On or about August 15, 1974, defendants rendered a statement to plaintiff estimating plaintiff's tax rent at $2.63 per square foot per year (Joint Statement, ¶65);

(e) On or about June 1, 1975, defendants rendered a statement to plaintiff esimating plaintiff's tax rent at $6.04 per square foot per year (Joint Statement, ¶66);

(f) As of the date of trial Magnaleasing has paid and has continued to pay Rent and Additional Rent billed to it by defendants under the lease (Joint Statement, ¶59);

(g) Real estate taxes in New York City are levied on the basis of a fiscal year beginning July 1 and ending June 30 (Joint Statement, ¶61); and

Affidavit by Lon Bannett, Sworn to March 4, 1977.

(h) The percentage increase in New York City real estate tax rates for fiscal year July 1, 1974 to June 30, 1975 was 6.8 percent, and for fiscal year July 1, 1975 to June 30, 1976, 11.3 percent (Joint Statement, ¶60)

9. Each of the facts necessary to compute overpayment of real estate taxes is set forth in paragraph 6. Plaintiff seeks damages consisting of the difference between the real estate taxes it actually paid and the taxes defendants represented plaintiff would have to pay, including normal tax increases. A determination of what plaintiff paid is computed by multiplying the per square foot charges for each period by the approximate square feet of floor space and adding the products. A determination of what plaintiff should have paid can be made in a similar manner by using the represented tax rent, $1.00 per square foot for the initial lease year, plus the percentage increase in the New York City tax rate for each subsequent lease year. The difference between what plaintiff paid and what it should have paid is plaintiff's overpayment of taxes. To this difference was added interest at the statutory rate, six (6%) percent.

10. The information necessary to compute common area charge overpayments is also contained in the trial record. The parties stipulated that (a) the lease defines "Additional Rent" to include common area charges (Joint Statement, ¶38) and (b) that defendants billed plaintiff $2.58 per square foot

per year for common area charges from the inception of the lease to the day of trial (Joint Statement, ¶63). Magnaleasing requested the Court to compute the normal inflation rate by using the 10% inflation rate derived from the United States Department of Labor, Bureau of Labor Statistics Consumer Price Index for the New York Metropolitan Area. (Plaintiff's Post-trial Brief at 33).

11. Each of the facts necessary to compute common area overpayments is set forth in paragraphs 6 and 8. Plaintiff computed its excess payment of common area charges before the Special Master by calculating the difference between what it actually paid and what it would have paid had defendants' representation been true and adding interest at the statutory rate. For the initial partial lease year, August 9, 1973 to January 31, 1974, plaintiff used $.60 per square foot as the common area charges it should have paid. For each subsequent lease year, plaintiff added a 10% inflation increase to the $.60 per square foot figure. The 10% figure was derived from the United States Department of Labor, Bureau of Labor Statistics Consumer Price Index for the New York Metropolitan Area for the years in question. The computation of what plaintiff actually paid can be made by multiplying the $2.58 per square foot common area charge by the stipulated number of square feet of floor space of plaintiff's store for the period that plaintiff occupied the store.

Affidavit by Lon Bannett, Sworn to March 4, 1977

12. Plaintiff's case before the Special Master was limited to testimony and documents setting forth the computation of damages based on the evidence in the trial record. Defendants used the reference as a forum to raise entirely new issues and conduct discovery in support of these issues.

13. As the record in the damages hearing indicates, the actual computation of each category of damages involved complex arithmetic calculations. These calculations included correlating lease years with New York City tax years; giving defendants credit for moneys paid to them by plaintiff's subtenant and money paid by them to plaintiff for the construction of the Mall store; adjusting tax and common area charges to reflect the inflationary increases and the increases in the New York City tax rate; and computing interest for each time period.

Facts With Respect
Defendants' Objection to the Reference

14. The Court's decision referring the matter for an accounting and computation of damages was rendered on June 30, 1976 and filed on July 6, 1976.

15. On July 12, 1976, plaintiff served its proposed judgment on defendants' attorney which contained a provision ordering a reference. On July 13, 1976, defendants served a proposed counter judgment on plaintiff's attorneys which judgment also contained a provision ordering a reference which stated:

Affidavit by Lon Bannett, Sworn to March 4, 1977

> ORDERED, ADJUDGED AND DECREED that this action be and the same hereby is referred to Magistrate Martin D. Jacobs, as Special Master, to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff.

A copy of defendants' proposed counter judgment is annexed hereto as Exhibit A.

16. The Court entered judgment on consent on July 20, 1976, which judgment was the proposed counter-judgment submitted to the Court by defendants on July 13, 1976. A copy of the judgment is annexed hereto as Exhibit B.

17. On July 14, 1976, the parties participated in a pre-hearing conference before Magistrate Jacobs. Defendants' made no objection to the reference. Instead, they requested substantial additional discovery concerning the manner in which plaintiff computed its damages and related issues. Defendants' counsel argued that because of the reference Magistrate Jacobs had the authority to reopen the proceedings and grant post-trial discovery. Magistrate Jacobs granted defendants' request for further discovery over plaintiff's opposition.

18. The parties participated in a second pre-hearing conference on July 29, 1976, to clarify the information sought by defendants. Defendants' counsel made no objection to the reference at this conference.

19. On July 29, 1976, defendants served a combination request for documents and interrogatories in letter form, which included a request that the answers be sworn to an officer, director or managing agent of Magnaleasing. A copy of this letter is annexed hereto as Exhibit C.

20. Plaintiff responded to the July 29, 1976 letter by a letter dated August 18, 1976, in which it set forth in substantial detail the information requested in defendant's July 29 letter. A copy of the August 18, 1976, letter is annexed hereto as Exhibit D.

21. Defendants requested and the parties participated in a third pre-hearing conference on August 23, 1976 at which the issue of whether or not plaintiff's August 18, 1976 letter was required to be verified was resolved. Defendants raised no objection to the reference at this conference.

22. It was not until the damage hearing held on August 31, 1976, after defendants had conducted post-trial discovery that defendants first objected to the reference. Magistrate Jacobs responded that their objection was untimely, stating:

> I would also like to say before concluding the matter that I had a pre-trial conference in this matter after the judge's memorandum order, that conference having been held on July 14, 1976, attended by counsel for both the plaintiff and the defendant, and there was no suggestion at that time before me that there was any objection to my going forward as Special Master to determine and report as to damages (T. 12,13).

Affidavit by Lon Bannett, Sworn to March 4, 1977

He also stated that it was not his function to rule on Mall's objection to the reference (T.10). Despite the Magistrate's admonition, defendants did not take their objection to the Court. Instead, at the end of the August 31, 1976 hearing, and at a fourth conference held on October 12, 1976 they again invoked the power of Magistrate Jacobs to require plaintiff to produce additional documents and its officers, agents and employees at a second damage hearing. Plaintiff produced the additional documents and its officers, agents and employees on November 4, 1976 to respond to issues which were raised by defendants for the first time at the damages hearing on August 31, 1976.

23. It was not until after the Magistrate filed a report determining damages adversely to defendants and plaintiff moved to confirm his report that defendants first raised their objection with the Court.

24. In light of the foregoing, defendants' assertion that they raised their objection to the reference "at the very outset of the reference" (Defendants' objections at 5) can be seen to be untrue.

Lon S. Bannett
LON S. BANNETT

Sworn to before me this
4th day of March, 1977

STUART POTTER
Notary Public, State of New York
No. 30-3144510
Qualified in Nassau County

Exhibit A, Defendants' Proposed Counter-Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MAGNALEASING, INC.,

Plaintiff,

- against -

STATEN ISLAND MALL,
BLACKFRIARS REALTY CORP. and
TOTTENHAM REALTY CORP.,

Defendants.

----------x

74 Civ. 5593 (LFM)

NOTICE OF SETTLEMENT
OF COUNTER-JUDGMENT

PLEASE TAKE NOTICE that the attached counter-judgment will be presented for settlement at the office of the Clerk of the United States District Court for the Southern District of New York, United States Courthouse, Foley Square, New York, New York, on the 14th day of July, 1976 at 9:30 o'clock in the forenoon.

Dated: New York, New York
July 13, 1976

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By James M. Bergen
A Member of the Firm
Attorneys for Defendants
430 Park Avenue
New York, New York 10022
(212) 421-7200

TO: KEANE & BUTLER
Attorneys for Plaintiff

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MAGNALEASING, INC.,

Plaintiff,

- against -

STATEN ISLAND MALL,
BLACKFRIARS REALTY CORP. and
TOTTENHAM REALTY CORP.,

Defendants.

----------x

74 Civ. 5593 (LFM)

COUNTER-JUDGMENT

This cause having come on for trial on March 22, 23 and 24, 1976, before Honorable Lloyd F. MacMahon, District Judge, and the Court having considered this cause upon the pleadings and evidence presented on trial and upon briefs by counsel for the parties and upon the findings of fact and conclusions of law set forth in the opinion filed in this Court on July 6, 1976, it is hereby

ORDERED, ADJUDGED AND DECREED that the lease agreement dated May 4, 1973 between plaintiff Magnaleasing, Inc. and defendant Staten Island Mall, a joint venture comprising Black-

Exhibit A

friars Realty Corp. and Tottenham Realty Corp., be and the same hereby is rescinded; and it is further

ORDERED, ADJUDGED AND DECREED that this action be and the same hereby is referred to Magistrate Martin D. Jacobs, as Special Master, to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff, and it is further

ORDERED, ADJUDGED AND DECREED that defendants' counterclaim be and the same hereby is dismissed without prejudice.

Dated: New York, New York
July , 1976

Exhibit B

Exhibit to Lon Bannett's Affidavit is the Judgment, filed July 20, 1976, which appears at page 50a of this Joint Appendix, Volume I.

Exhibit C, July 29, 1976 Jeffrey Newman Letter to Thomas A. Butler

WASHINGTON OFFICE: 815 15TH STREET, N.W.
WASHINGTON, D.C. 20005

CABLE ADDRESS: RETTARB
TELEX: 127544

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER

430 PARK AVENUE, NEW YORK, N.Y. 10022 · (212) 421-7200

July 29, 1976

BY HAND

Thomas A. Butler, Esq.
Keane & Butler
200 Park Avenue
New York, New York 10017

Re: Magnaleasing, Inc. v. Staten Island Mall, et al.

Dear Tom:

In accordance with Magistrate Jacobs' directive of July 14, 1976, please supply us with the information requested below. Respecting the questions, please furnish sworn answers from an officer, director or managing agent of Magnaleasing, Inc. Please furnish both answers and documents at least one week prior to any hearing date fixed by Magistrate Jacobs.

---

1. Respecting the $82,925.00 claimed (your July 9, 1976 letter) for the cost of leasehold improvements,

A. Set forth the nature of such improvements;

B. Set forth the method by which the specific amount claimed was calculated;

C. State whether and to what extent it was Magnaleasing, Inc. ("Magnaleasing"), The Magnavox Company ("Magnavox") and/or some other person or entity which expended such moneys;

D. State whether and to what extent Magnaleasing, Magnavox or some other entity (as the case may be) was reimbursed, in whole or in part, directly or indirectly, by Regal of Staten Island, Inc. ("Regal"), Bel-Mart Stores ("Bel-Mart"), Morris Glicklich ("Glicklich") and/or any other person or entity for such expenditures.

Exhibit C

2. Respecting the $16,772.00 claimed (your July 9, 1976 letter) for overpayment of common area charges,

A. Set forth the method by which the specific amount claimed was calculated;

B. State whether and to what extent it was Magnaleasing, Magnavox and/or some other person or entity which expended such moneys;

C. State whether and to what extent Magnaleasing, Magnavox or some other entity (as the case may be) was reimbursed, in whole or in part, directly or indirectly, by Regal, Bel-Mart, Glicklich and/or any other person or entity for such expenditures.

3. Respecting the $33,564.00 claimed (your July 9, 1976 letter) for overpayment of tax rent charges,

A. Set forth the method by which the specific amount claimed was calculated;

B. State whether and to what extent it was Magnaleasing, Magnavox and/or some other person or entity which expended such moneys;

C. State whether and to what extent Magnaleasing, Magnavox or some other entity (as the case may be) was reimbursed, in whole or in part, directly or indirectly, by Regal, Bel-Mart, Glicklich and/or any other person or entity for such expenditures.

4. Respecting the sublease ("Sublease") entered into as of July 16, 1973, between Magnaleasing and Regal,

A. State whether the Sublease was ever amended in writing; if so, furnish a copy of such writing(s);

B. State whether the Sublease was ever amended orally; if so, state the substance of such amendment(s);

C. Furnish copies of any Dealer Agreements executed in accordance with and as defined by paragraph 7 of the Sublease;

Exhibit C

MARSHALL, BRATTER, GREEN, ALLISON & TUCKER

Thomas A. Butler, Esq.
July 29, 1976
Page Three

D. State the nature and approximate value of any improvements, additions and alterations that became the property of Magnaleasing in accordance with paragraph 10 of the Sublease;

E. State whether, to what extent, by whom and to whom moneys were paid in accordance with paragraph 11 of the Sublease;

F. State whether, to what extent, by whom and to whom moneys were paid in accordance with paragraph 10 of the Sublease.

Very truly yours,

Jeffrey Newman

JN:lb
cc: Hon. Martin D. Jacobs

29.1

Exhibit D, August 18, 1976 Edward F. Beane
Letter to Jeffrey Newman

August 18, 1976

Jeffrey Newman, Esq.
Marshall Bretter Greene Allison & Tucker
430 Park Avenue
New York, New York 10022

Re: Magnaleasing, Inc. v.
Staten Island Mall et al

Dear Jeff:

In response to your letter of July 29, 1976 to Thomas A. Butler, I hereby furnish you with the requested information with respect to the damages to be claimed by Magnaleasing, Inc.

Response to paragraph 1 of your letter:
Damages suffered by Magnaleasing for construction, improvements, additions and alterations are as follows:

1.	Architectural fees	$ 4,500
2.	Architectural disbursements	358
3.	Carpeting and Flooring	6,854
4.	Fabrication of Sign	1,875
5.	Installation of Interior Display Booths	4,066
6.	Interior Fixtures	21,843
7.	Additional Fixtures	1,417
8.	Construction	65,008
9.	Exterior Lights	75
10.	Chain Hang	75
11.	Grand Opening Ass'n & Fee	940
12.	Miscellaneous	70
		$$07,073

During pre-trial discovery, you examined Messrs. Henry Grenesco and William Cline with respect to these matters and requested and were furnished with the documents relating thereto.

Exhibit D

Jeffrey Newman, Esq. August 18, 1976

To compute Magnaleasing's pecuniary loss with respect to these costs, we subtracted 30 months depreciation from the total cost of construction. Magnaleasing, Inc. had been depreciating these assets over a 15-year period (180 months), depreciation having commenced on January 1, 1974. Thirty months elapsed through June 30, 1976 when the Court rescinded the lease. Upon rescission, the improvements to the store became valueless. Using this method, the amount Magnaleasing claims is $89,904 plus interest at the statutory rate of 6% per annum.

Moneys for the above items were paid by Magnaleasing by checks drawn on the account of Magnavox Company which were specially coded to signify that the payment was a Magnaleasing payment. The moneys so expended were charged as expenditures to the books and records of Magnaleasing, Inc. Magnaleasing maintained separate books and records throughout its existence on which income received by it and expenditures made by it were recorded. The improvements and additions were recorded as assets of Magnaleasing. Their cost was charged as an expenditure on Magnaleasing's books and records.

Magnaleasing received a tenant's allowance of $7,216. Neither Magnaleasing nor Magnavox received any other payment with respect to the above expenditures either directly or indirectly.

<u>Response to paragraph 2 of your letter:</u>
Magnaleasing will establish its claim for common area charges by computing the difference between the actual common area charges paid by Magnaleasing from August 1973 to June 30, 1976 and the amount it would have paid during the same period had Staten Island Mall's representation as to common area charges been true. The common area charges Magnaleasing would have paid, had the representation been true, would have been $.60 per square foot for the initial lease year, from August 1973 to January 31, 1974, increased by the rate of inflation for subsequent lease years. We used an average rate of inflation of 10% for each subsequent lease year. Thus, for the period from February 1, 1974 to January 1, 1975, Magnaleasing should have paid $.66 per square foot ($.60 plus 10% of $.60); for the period from February 1, 1975 to

Exhibit D

Jeffrey Newman, Esq. August 18, 1976

January 31, 1976, $.72 per square foot; and from February 1, 1976 to June 30, 1976, $.78 per square foot. Because the lease was rescinded on June 29, 1976, Magnaleasing, Inc. is entitled to a refund of all the common area charges it paid for July, 1976. Magnaleasing used 3,608 square feet as the total area of its store.

Common area charges paid by Regal Magnavox directly to the Staten Island Mall were not included in the computation. On the basis of these computations, Magnaleasing is entitled to $18,121.06 plus interest at 6% per year for its overpayment of common area charges.

Moneys for the above items were paid by Magnaleasing by checks drawn on the account of Magnavox Company which were specially coded to signify that the payment was a Magnaleasing payment. The moneys so expended were charged as expenditures to the books and records of Magnaleasing, Inc. Magnaleasing maintained separate books and records throughout its existence on which income received by it and expenditures made by it were recorded. The common area charges paid to Staten Island Mall were charged as expenditures on Magnaleasing's books and records.

Neither Magnaleasing nor Magnavox received any reimbursement for common area charges. Regal paid the sum of $360.42 to Magnaleasing, Inc. which Regal designated as applying to such charges. At the time said sum was received, Regal was indebted to Magnaleasing for a sum in excess of this amount for other matters.

<u>Response to paragraph 3 of your letter:</u>
Magnaleasing will establish its claim for its overpayment of real estate taxes by computing the difference between the real estate taxes actually paid by Magnaleasing from August 1973 to June 30, 1976 and the amount it would have paid in the same period had Staten Island Mall's representations with respect to real estate taxes been true. The real estate taxes Magnaleasing would have paid if the representation were true was $1.00 per square foot for the initial tax year from August 1973 to June 30, 1974, in-

Exhibit D

Jeffrey Newman, Esq. August 18, 1976

creased by an amount equal to the increase in the New York City tax rate for each subsequent tax year. The percentage increases in the tax rates, which were stipulated by us during the trial (Stipulated Facts, para. 6) are as follows:

July 1, 1974 to June 30, 1975	-	6.8%
July 1, 1975 to June 30, 1976	-	11.3%

Thus, for the period from July 1, 1973 to June 30, 1974, Magnaleasing, Inc. should have paid real estate taxes of $1.00 per square foot; from July 1, 1974 to June 30, 1975, Magnaleasing should have paid real estate taxes of $1.07 per square foot ($1.00 per square foot plus 6.8% of $1.00 per square foot); from July 1, 1975 to June 20, 1976, Magnaleasing should have paid real estate taxes of $1.19 per square foot. Because the lease was rescinded on June 29, 1976, Magnaleasing, Inc. is entitled to a refund of all the real estate taxes it paid for July 1976. Magnaleasing used 3,608 square feet as the total area of its store in computing its overpayment. Real estate taxes paid by Regal Magnavox directly to the Staten Island Mall are not included in this computation. Pursuant to these computations, Magnaleasing, Inc. is entitled to $34,726.06 plus interest at 6% per annum as damages for its overpayment of real estate taxes.

Moneys for the above items were paid by Magnaleasing by checks drawn on the account of Magnavox Company which were specially coded to signify that the payment was a Magnaleasing payment. The moneys so expended were charged as expenditures to the books and records of Magnaleasing, Inc. Magnaleasing maintained separate books and records throughout its existence on which income received by it and expenditures made by it were recorded. The real estate taxes paid were charged as expenditures on Magnaleasing's books and records.

Neither Magnaleasing nor Magnavox received any moneys for real estate taxes from any source. Regal Magnavox paid to Magnaleasing the sum of $301.34 which it designated as applying to real estate taxes. At the time said sum was received, Regal was indebted to Magnaleasing for a sum in excess of this amount for other matters.

Exhibit D

Jeffrey Newman, Esq. August 18, 1976

Response to paragraph 4 of your letter:
The sublease between Magnaleasing and Regal has not been amended either orally or in writing since the date of its execution. With respect to request paragraph 4 D, there is a single dealer agreement between Magnavox and Regal which was executed on or about June 3, 1969, four years prior to date on which the lease between Magnaleasing and Staten Island Mall was executed. It has no relevance to the issue to be tried before Magistrate Jacobs, "the amount of damages due to plaintiff" (Memorandum of Judge MacMahon, at 14). For that reason, we decline to furnish you with such agreement.

In respect to paragraph 4 D, in our telephone conversation yesterday afternoon, you indicated that the information sought was whether there were any improvements, additions or alterations made to the Staten Island Mall store other than those already listed in the response to paragraph 1. No such additional improvements, alterations or additions were made.

With respect to paragraph 4 E of the letter, Regal paid Magna-l leasing the sum of $500 in advance for the first month of the operation of the sublease. Regal did not make any other payments. Its volume of annual retail sales never exceeded $545,455 and therefore, Regal never became obligated to pay 1.1% of any such excess.

With respect to paragraph 4 F, during our telephone conversation of yesterday afternoon, you indicated the question refers to paragraph "12" of the sublease. No payments were made to Magnaleasing by anyone pursuant to paragraph "12".

We do not agree to stipulate that Mr. John Kelly's lease comments (Defendant's Exhibit L for identification) are a trial exhibit. The trial transcript (pp. 201-202) indicates that your request that the comments be received as evidence was objected to by Mr. Butler and were not received in evidence by the Court.

Very truly yours,

Edward F. Beane

Exhibit D

CORPORATE VERIFICATION

STATE OF NEW YORK
ss.:
COUNTY OF NEW YORK

THOMAS M. HAFNER, being duly sworn, deposes and says:

Deponent is the assistant secretary of Magnaleasing, Inc., plaintiff in an action entitled Magnaleasing, Inc. v. Staten Island Mall, et al. Deponent has read the foregoing letter dated August 18, 1976 from Edward F. Beane, Esq. to Jeffrey Newman, Esq. and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because Magnaleasing Inc. is a corporation and deponent is an officer thereof. The grounds of deponent's belief as to all matters are the books and records of Magnaleasing, Inc.

Thomas M. Hafner

Sworn to before me this
26th day of August, 1976

Karen D. Patane

KAREN D. PATANE
Notary Public, State of New York
No. 43-[illegible]3375
Qualified in [illegible] and County

Opinion #45714, Filed March 22, 1977

Copy

U.S. DISTRICT COURT
FILED
MAR 22 1977
2:25 PM
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MAGNALEASING, INC.,

Plaintiff,

-against-

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,

Defendants.

----------x

74 Civ. 5593 (LFM)

MEMORANDUM

#45714

MacMAHON, District Judge.

Plaintiff moves, by order to show cause, to confirm the report of Magistrate Martin D. Jacobs, pursuant to Rule 53(e)(2), Fed.R.Civ.P.

In our decision dated June 30, 1976, we granted plaintiff rescission of its lease with defendant, Staten Island Mall, finding that defendants had made material misrepresentations with respect to occupancy levels, amount of tax rent, and amount of common area charges. We also referred the action to Magistrate Jacobs, as

Special Master, "to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff," because it appeared that the damage issue was complex and would involve time-consuming mathematical computations or matters of accounting best delegated to a Magistrate.

Opposing the motion, defendants contend that by our reference we improperly reopened the case, thus giving plaintiff "two bites of the apple" in proving damages. We disagree.

The trial record contained sufficient evidence for a computation of damages by the Special Master but, in our view, required clarification and focusing into a meaningful pattern of proof. The case was not reopened to hear new evidence on the damage issue. In any event, the trial judge, in his sound discretion, may reopen a case and sua sponte refer it to a Special Master to hear further evidence.[1]

Defendants have failed to make any showing of prejudice or surprise by any additional evidence, and any such evidence was received merely to clarify that

already offered at trial. Therefore, even if the case were deemed to have been reopened, we find that the reopening was in the interests of fairness and substantial justice.

Defendants contend that the reference was improper because the case does not involve the determination of issues for which a reference is appropriate. However, that objection is untimely and not made in the proper forum because defendants did not raise it until their appearance before the Magistrate for the hearing on damages. An objection to reference should be made before the trial judge at or prior to the time of reference.[2] Furthermore, defendants waived that objection by consenting to the judgment of reference. Finally, this non-jury action obviously falls within the category of cases appropriate for reference to a Magistrate because it involves matters of accounting and complex damage computations.[3] Therefore, we find the reference was proper in all respects.

Defendants also contend that plaintiff Magnaleasing is not entitled to any damages because any

damages involved in this case were incurred by Magnavox, its parent company, rather than by plaintiff. However, plaintiff operated as a separate corporate and financial entity. Although the payments for improvements, rent, and taxes were made directly by Magnavox on behalf of plaintiff, plaintiff incurred a liability to Magnavox for those expenditures and has in fact been repaying Magnavox.[4] Therefore, plaintiff is entitled to damages.

Defendants further contend that plaintiff is not entitled to damages representing the difference between the common area charges and tax rent paid and that which defendants represented would be due because it is a claim for lost profits, a forbidden measure of damages under New York law. Such a contention is totally lacking in merit. It is clear that the measure of damages in an action for fraud is the pecuniary loss suffered by the defrauded party as a direct result of the false representations.[5] Plaintiff seeks, in effect, restitution of the excess money it actually paid to defendants for common area charges and tax rent, and those payments are a pecuniary loss directly caused by defendants' fraudulent misrepresentations.

Defendants also claim that plaintiff failed to mitigate damages. Defendants, however, have failed to carry their burden of showing how plaintiff acted unreasonably or what damages it could have mitigated. In addition, the Magistrate found that the improvements were particularly adapted for use in the store and would have no salvage value if removed. We cannot say that conclusion is clearly erroneous. We, therefore, reject defendants' contention that plaintiff failed to mitigate damages.

Defendants further contend that it is improper to assess damages attributable to tax rent and common area charges on the basis of "leased" space, as provided in plaintiff's lease with the Mall, because plaintiff could have secured lower rates based on "leasable" space. Thus, defendants argue, the damages representing the difference between those rates is attributable to plaintiff's inept negotiating rather than to defendants' misconduct. Defendants cite absolutely no authority for this proposition, and we think it is patently wrong.

Plaintiff suffered damages because it made payments on the basis of leased space, and those damages resulted from defendants' misrepresentations which induced plaintiff to sign the lease. Plaintiff is entitled to damages based upon the lease which it actually signed and the monies it expended as a result, not upon some hypothetical lease or expenditures. Furthermore, there would have been little difference between damages based upon leased space and those based on leasable space had the actual occupancy level been as defendants represented. Finally, 101 of the 114 leases at the Mall were entered into on a leased space basis, and, therefore, plaintiff's lease was neither unusual, nor it appears, the result of inferior bargaining.

An appropriate sum for inflationary costs which plaintiff would have incurred in any event must be subtracted from plaintiff's claim for overpayment of common area charges to arrive at the proper amount of damages. Defendants, however, challenge the 15.5% inflationary rate the Magistrate selected to comptue that sum and argue that either a 48.7%, 42.2% or 24.9% rate is closer to the actual rate. Plaintiff had earlier

Opinion #45714, Filed March 22, 1977

championed a 10.0% rate. All of these rates are subject to challenge on one ground or another because the data from which they were computed is incomplete and does not permit accurate comparison between different years due to the method and manner of its compilation.

The Magistrate found that the most significant evidence concerning the inflationary rate was that common area charges assessed against plaintiff had not increased since it entered the Mall in August 1973. In addition, defendants did not introduce any evidence of increases in common area expenses since the shopping center was opened. Under all the circumstances, we cannot say that the Magistrate's conclusion that a 15.5% rate was appropriate is clearly erroneous.

Accordingly, plaintiff's motion to confirm the report of Magistrate Jacobs, dated February 14, 1977, is granted. Settle judgment within ten (10) days.

Dated: New York, N. Y.
March 22, 1977

Lloyd F. MacMahon

LLOYD F. MacMAHON
United States District Judge

Opinion #45714, Filed March 22, 1977

Magnaleasing, Inc. v. Staten Island Mall et al. 74 Civ. 5593 (LFM)

FOOTNOTES

1

See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331-32 (1971); First Iowa Hydro Elec. Corp. v. Iowa-Illinois Gas & Elec. Co., 245 F.2d 613, 627 (8th Cir. 1957); Smith v. Brown, 3 F.2d 926, 927 (5th Cir. 1925); Reconstruction Finance Corp. v. Commercial Union of America Corp., 123 F. Supp. 748, 750 (S.D.N.Y. 1954); 6A J. Moore, Federal Practice ¶ 59.04[13] (2d ed. 1974).

2

See Cruz v. Hauck, 515 F.2d 322, 331 (5th Cir. 1975), cert. denied, 424 U.S. 917 (1976).

3

See 28 U.S.C. § 636(b)(2); Rule 53(b), Fed.R.Civ.P.; Jurisdictional Checklist, Judicial Conference Committee on the Administration of the Federal Magistrates System, II(C)(1)(5).

4

Silinsky v. State-Wide Ins. Co., 30 A.D.2d 1, 289 N.Y.S.2d 541, 546 (2d dep't 1968); see Kinsfather v. Grueneberg, 47 A.D.2d 789, 365 N.Y.S.2d 903, 907-08 (3d dep't 1975).

5

See Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798, 802 (2d Cir. 1960).

Judgment #77,449, Filed March 31, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

U.S. DISTRICT COURT
FILED
MAR 31 1977
S.D. OF N.Y.

MAGNALEASING, INC.,

Plaintiff,

-against-

74 Civ. 5593 (LFM)

STATEN ISLAND MALL,
BLACKFRIARS REALTY CORP., and
TOTTENHAM REALTY CORP.,

Defendants.
----------x

JUDGMENT

#77,449

WHEREAS this cause having come on for trial on March 22, 23 and 24, 1976, before Honorable Lloyd F. MacMahon, District Judge, and the Court having considered this cause upon the pleadings and evidence presented on trial and upon briefs by counsel for the parties and upon the findings of fact and conclusions of law set forth in the opinion filed in this Court on July 6, 1976, and

WHEREAS it was Ordered, Adjudged and Decreed by the Judgment of this Court dated July 14, 1976 that the lease agreement dated May 4, 1973 between plaintiff Magnaleasing, Inc. and defendant Staten Island Mall, a joint venture comprising Blackfriars Realty Corp. and Tottenham Realty Corp., be and the same was thereby rescinded; and

WHEREAS it was further Ordered, Adjudged and Decreed that defendants' counterclaim be and the same was thereby dismissed without prejudice; and

Judgment #77,449, Filed March 31, 1977

WHEREAS it was further Ordered, Adjudged and Decreed that this action be and the same was thereby referred to Magistrat Martin D. Jacobs, as Special Master, to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff, and

WHEREAS, a motion by order to show cause having come on to be heard to confirm the report of Magistrate Martin D. Jacobs dated February 14, 1977, and upon the affidavits of Thomas A. Butler sworn to February 17, 1977 and Lon S. Bannett, sworn to March 4, 1977 in support of said motion and Defendants Objections to the Special Masters Report, dated February 28, 1977 and oral argument having been had on March 7, 1977 and after due deliberation this Court having filed an opinion on March 22, 1977 it is:

ORDERED, ADJUDGED AND DECREED, that the report of the Special Master, Magistrate Martin D. Jacobs, dated February 14, 1977 be and the same hereby is confirmed in its entirety and the same is hereby adopted as the opinion of this Court, and it is further

Judgment #77,449, Filed March 31, 1977

ORDERED, ADJUDGED AND DECREED that plaintiff Magna-leasing, Inc. recover from the defendants, Staten Island Mall, Blackfriars Realty Corp. and Tottenham Realty Corp. the sum of $156,769.99 with interest thereon from September 1, 1976 at the rate of 6% as provided by law and the costs and disbursements of this action.

Dated: New York, New York
March 25, 1977

U. S. D. J.

Judgment Entered: — 3-31-77

Clerk

Defendants' Notice of Appeal, Filed
April 28, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MAGNALEASING, INC.,

Plaintiff,

- against -

STATEN ISLAND MALL,
BLACKFRIARS REALTY CORP. and
TOTTENHAM REALTY CORP.,

Defendants.

----------x

74 Civ. 5593 (LFM)

NOTICE OF APPEAL

S I R S :

PLEASE TAKE NOTICE that Staten Island Mall, Blackfriars Realty Corporation and Tottenham Realty Corporation, defendants in the above-entitled action, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment

entered in this action on March 31, 1977 and from each and every part thereof.

Dated: New York, New York
April 28, 1977

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By James M. Beyer
A Member of the Firm

Attorneys for Defendants
Staten Island Mall, Blackf[illegible]
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Tottenham Realty Corporati[illegible]
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TO: CLERK
United States District Court
United States Courthouse
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New York, New York 10007

KEANE & BUTLER
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